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THE SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO

The People of the State of California, Plaintiff, vs. NEKO WILSON, Defendant.	Case No.: F09904296 District Attorney No.: 2009F25793 **PEOPLE'S SENTENCING MEMORANDUM AND MOTION TO SET ASIDE PLEA** Date: April 25, 2019 Time: 8:30 a.m. Department: 60

TO: THE HONORABLE JOHN VOGT, JUDGE OF THE ABOVE-ENTITLED COURT AND TO DEFENDANT NEKO WILSON AND HIS ATTORNEY OF RECORD JACQUE WILSON:

I.
PROCEDURUAL HISTORY

On August, 7, 2019, Neko Wilson was charged with two counts of murder relating to a homicide that occurred on July 22, 2009. On September 30, 2019, Governor Brown signed Senate Bill 1437 (Accomplice liability for felony murder). In reliance on S.B. 1437, the People entered in a to plea deal with Wilson. Wilson pled guilty to two counts of robbery, and a viacarous arming enhancement. Wilson also entered pleas on two trailing cases. Sentencing was continued several times for reasons unrelated to this issue. The People are now asking the Court to set aside Wilson's plea due to S.B. 1437 being unconstitutional.

II.

STATEMENT OF THE LAW

A. SB 1437 IS UNCONSTITUTIONAL

In 1978, frustrated with ineffective sentencing laws for murder and a weak and ineffective Legislature, the people of the state of California put forth and overwhelmingly passed Proposition 7, known as the Briggs Initiative, to "turn back the tide of violent crime" in California by imposing increased and lengthy prison terms for first and second-degree murder. Forty years later, believing it knew better than 71 percent of voters, the Legislature dramatically upended the will of the people by clawing back the law of murder and its sentencing in violation of the California Constitution.

On August 30, 2018 the Legislature passed Senate Bill 1437 (S.B. 1437) by 67.5 percent in the Senate, but only 52.5 percent in the Assembly. One month later, on September 30, 2018, Governor Brown signed the bill into law. S.B. 1437 amends Penal Code section 188 and eliminates decades-to-century-old judicially-recognized legal constructions that impute the malice necessary for murder onto a person based on his or her participation in a crime. The law also amends Penal Code section 189 to limit those who can be prosecuted for first-degree felony murder, and adds Penal Code section 1170.95 providing for a resentencing scheme to anyone previously lawfully convicted of first or second-degree murder, but who could not be convicted for murder under the new law.

In early 2018, the California Assembly acknowledged in Assembly Bill 3104, its own similar version of S.B. 1437, that any changes to Penal Code sections 189, 190, or 190.2 required a 2/3 vote of both houses to pass, because such legislative action would amend Proposition 115. (see Exhibit A – Legis. Counsel's Dig., Assem. Bill No. 3104 (2017-2018 Reg. Sess), Summary Dig., p. 2.).)

Subsequently, the Legislative Counsel's Office advised that the proposed amendments to Penal Code sections 188 and 189 encompassed in S.B. 1437 affecting accomplice liability would require voter approval under article II, section 10 of the California Constitution, because they affected the 1978 Briggs Initiative by changing the scope and effect of that initiative. (see Exhibit B – Legislative Counsel Bureau opinion letter dated June 20, 2018.) The Legislature chose to ignore that legal advice and passed S.B. 1437 without voter approval and by less than 2/3 vote in both houses, thereby usurping the will of the electors of both Proposition 7 and Proposition 115, and violating the California Constitution.

Furthermore, the resentencing petition process established under S.B. 1437 (Pen. Code, § 1170.95), violates the separation of powers doctrine as decided in People v. Bunn (2002) 27 Cal.4th 1, infra, by its express mandate that qualifying lawful murder convictions "shall be vacated." The resentencing provision also stands in direct conflict with the California Constitution as enacted as part of Proposition 9 (2008), Victims' Bill of Rights Act of 2008 (Marsy's Law).

The purpose of California's constitutional limitation on the legislature's power to amend initiative statutes is to "protect the People's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent." (Huening v. Eu (1991) 231 Cal.App.3d 766, 781 (conc. and dis. opn. of Raye, J.).) For the reasons originally acknowledged by the California Assembly, the further reasons cited by the Legislative Counsel's Office, and the additional reasons set forth below, S.B. 1437's amendment to Penal Code sections 188 and 189 must be stricken in its entirety.

i. THE LEGISLATURE MAY AMEND OR REPEAL INITIATIVE STATUTES ONLY AS PROVIDED FOR IN THE INITIATIVE OR WITH APPROVAL OF THE ELECTORS

Despite the Legislature's declaration in S.B. 1437 that "[t]he power to define crimes and

fix penalties is vested exclusively in the Legislative branch" (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 1, subd. (a)), in adopting its constitution, the people of the State of California chose not to vest the sole and exclusive right to enact statutes in the Legislature. Specifically, article IV, section 1 of the California Constitution states, "[t]he legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, *but the people reserve to themselves the powers of initiative and referendum.*" (Cal. Const., art. IV, § 1, italics added.) Those reserved powers of the people are contained in article II, sections 8 and 9 of the California Constitution, which respectively instruct: "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them," and "[t]he referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." Balancing the People's reserved power, article II, section 10 provides that the Legislature "may amend or repeal a referendum statute. *The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval.*" (Cal. Const., art. II, § 10, subd. (c), italics added.)

The "purpose of limiting the Legislature's power to amend an initiative statute ' "is to 'protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.' " ' " (County of San Diego v. Commission on State Mandates (2018) 6 Cal.5th 196, 211 (Commission on State Mandates).) So important is the peoples' power that:

> "[t]he initiative and referendum are not 'rights granted the people, but . . . power[s] reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be

improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." ' [citations.]" (Rossi v. Brown (1995) 9 Cal.4th 688, 695,)

"The people's reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures [citation.], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (Id. at p. 715, italics in original.)

ii. SENATE BILL 1437 UNCONSTITUTIONALLY AMENDS PROPOSITION 7 AND SHOULD BE STRICKEN

"[A]n amendment includes a legislative act that changes an existing initiative statute by taking away from it." (People v. Kelly (2010) 47 Cal.4th 1008, 1027.) A legislative statute amends an initiative statute when it changes the "scope or effect" of an initiative. (Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal.App.4th 1473, 1484-1485 (Quackenbush). S.B. 1437 takes away from Proposition 7's mandates regarding the penalties for first and second-degree murder by redefining and narrowing what constitutes the crime of murder for an accomplice, thereby lessening the penalty for murder as then defined and interpreted.

The "courts have a duty to jealously guard the people's initiative and hence to apply a liberal construction to this power wherever it is challenged in order that the right to resort to the initiative process be not improperly annulled by a legislative body." (Kelly, supra, 47 Cal.4th at p. 1025, internal quotations and citations omitted.) "Any doubts should be resolved in favor of the initiative and referendum power, and amendments which *may* conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted ordinances, where the original initiative does not provide otherwise." (Quackenbush, supra, 64 Cal.App.4th at p. 1486, italics in original.) "[A]n amendment [is] a legislative act designed to change some prior or existing law by adding or taking from it some particular provision." (Id. at

p. 1485, internal quotations and citations omitted.) S.B. 1437 amends the penalties for murder by redefining the crime of murder.

In Quackenbush, a people's initiative statute known as Proposition 103 relating to insurance premium rollbacks enacted statutes providing for, among other things, excess premiums paid to insurers to be refunded to policyholders after premium rollbacks were applied. The initiative reserved to the legislature the power to amend the provisions of Proposition 103 only to further serve the purpose of the initiative, and then by either 2/3 vote in both houses or voter approval. (Id. at p. 1479.) Subsequently, the legislature passed a separate statute that directed the insurance commissioner to deduct certain expenses incurred by insurers from its total premium income, which had the effect of reducing an insurer's overall rollback obligation. (Id. at pp. 1479-1480.) The proponents of Proposition 103 sued for injunctive relief arguing the legislative statute resulted in an unauthorized amendment to Proposition 103, because it effectively reduced the amount of refund due policyholders after rollbacks, and in so doing the amendment did not serve the purpose of the initiative. (Id. at p. 1478) The insurance commissioner argued that the statute passed by the legislature was not " 'directed to any provision of Proposition 103, let alone [toward] changing the scope and effect for such a provision by adding or subtracting something from it.' " (Id. at p. 1484.)

Quackenbush held that the legislature could not "indirectly accomplish via the enactment of a statute which essentially amends any formula adopted to implement an initiative's purpose, what it cannot accomplish directly by enacting a statute which amends the initiative's statutory provisions." (Quackenbush, supra, 64 Cal.App.4th at p. 1487.) Quoting our Supreme Court in Sheehy v. Shinn (1894) 103 Cal. 325, 340, the court stated, "[t]o give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated." (Quackenbush, supra, at p. 1487.) The Court of Appeal found that even though the statue was

independent of Proposition 103, it was still an amendment and therefore "constitutionally invalid as an act in excess of the legislature's powers." (Id. at p. 1478)

Similarly, in Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal.App.4th 32 (Mobilepark), the Court of Appeal examined whether a city ordinance seeking to clarify alleged ambiguities in a city ordinance relating to controls of mobile home space rent increases passed by voter initiative – Proposition K – by redefining the term "tenant" used in the initiative to expand its meaning, and by adding additional requirements to the original initiative ordinance was an improper legislative amendment of an initiative measure.

In rejecting the City's primary argument, the court stated, "[the City's] ordinance goes beyond the original scope of Proposition K by adding to the definition of tenants affected by the initiative, and by requiring owners to offer certain options and disclosures before exempt leases may be executed." (Mobilepark, supra, 35 Cal.App.4th at p. 42.) "Proposition K is not an ambiguous measure in its definition of the 'tenant' to be governed by the rent protection ordinance (not including prospective tenants). Nor are any ambiguities raised by the terms of Proposition K as to the requirements for entering into rent control-exempt leases, such as [the City's ordinance] addresses." (Id. at p. 43.) Finally, the court rejected the City's contention that its ordinance was a " 'separate ordinance [which does] not purport to amend [Proposition K]' " because it was merely legislation in a related but distinct area, holding instead that "because Proposition K establishes comprehensive rent control procedures, its scope of coverage and the conditions under which a rent control exempt lease may be entered into are not merely a related area, but rather go to the heart of the coverage of the initiative measure." (Ibid.) What constitutes the crime of murder can hardly be construed as a distinct but related area. One cannot set the penalties for murder without knowing what constitutes the crime of murder.

For an illustration of what does *not* constitute an amendment, there is the case of People

v. Cooper (2002) 27 Cal.4th 38, a case dealing specifically with Proposition 7. Acknowledging that the "purpose of the Briggs Initiative was to substantially increase the punishment for persons convicted of first and second-degree murder" (Id. at p. 42), the California Supreme Court held that the amendment to Penal Code section 2933.1, which reduced the amount of presentence credits a murder defendant may earn in prison, was not an amendment of Proposition 7. (Id. at p. 47.) To be sure, Proposition 7 did specifically allow for the reduction of the newly enacted 25 or 15-year minimum parole eligibility terms pursuant to "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code" (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), § 2), but, at the time, those sections only addressed post-sentence credits. Because Proposition 7 only referred to sections then relating to post-sentence credits, the presentence credit limitations added in Penal Code section 2933.1 did not affect an amendment[1]. Moreover, "the trial court's restriction of presentence conduct credits under section 2933.1 [was] not inconsistent with former section 190 and [did] not otherwise circumvent the intent of the electorate in adopting the Briggs Initiative." (People v. Cooper, supra, at p. 48.)

1. SB 1437 Created Penal Code Section 1170.95, Amending Proposition 7

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1 Cooper also distinguished In re Oluwa (1989) 207 Cal.App.3d 439, which was also a challenge relating to the Briggs Initiative. Oluwa was convicted of second-degree murder and therefore under Proposition 7 he was eligible for the prison credits then in effect (a maximum 1/3 reduction of post-sentence credit.) (Id., at p. 442.) Noting that Proposition 7 dramatically increased the sentences for first and second-degree murder, the court in Oluwa held that the Legislature's subsequent enactment of a more generous credit scheme for post-sentence credit than was in effect at the time Proposition 7 was passed was an illegal amendment, despite the fact that Proposition 7, by its express terms, never defined the percentage of post-conviction credits. (Id., at pp. 445-446.)

In 1978, an overwhelming 71 percent of the voters in California passed Proposition 7 known as the Briggs Initiative (hereinafter "Proposition 7"). The purpose of the initiative was to "turn back the rising tide of violent crime that threatens each and every [Californian]" by promulgating longer sentences for first-degree and second-degree murder and creating a tough and effective death penalty law. (see Exhibit C – relevant pages from Voter Information Guide for 1978, General Election (1978); also available at: http://repository.uchastings.edu/ca_ballot_props/840.) Proposition 7 amended Penal Code section 190[2] to set the minimum term for first-degree murder at 25-years-to-life and to increase the punishment for second-degree murder from a determinate term triad to 15-years-to-life. S.B. 1437's newly-created Penal Code section 1170.95 amends Proposition 7, by authorizing the trial court to resentence defendants previously lawfully convicted and sentenced for first and second-degree murder to a sentence other than 25-years or 15-years-to-life.

The legislative digest of S.B. 1437 recognized that existing law enacted by Proposition 7 prescribes the penalties for first and second-degree murder, and further recognized that the bill would provide a means of vacating previously valid first and second-degree murder convictions and resentencing defendants. (see Exhibit D – Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.), Summary Dig., p. 2.) The law accomplished the sweeping murder sentencing overhaul by adding Section 1170.95 to the Penal Code, providing for a petition process by which a defendant previously lawfully convicted and sentenced for first or second-degree murder can seek resentencing in the trial court to a sentence substantially less than 15-years or 25-years-to-life. Thus, the resentencing provision changes the scope and effect of Proposition 7 by permitting courts to impose sentences on those convicted for first and second-degree murder to

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2 Proposition 7 also amended Penal Code section 190.2, which is not in

something other than the sentences authorized by the voters in 1978 without the approval of the electorate.

Voters are deemed aware of laws in existence at the time of approving an initiative, including the definition of the crime for which they are imposing a sentence. (Professional Engineers in California Government v. Kempton (2007) 40 Cal.4th 1016, 1048; People v. Weidert (1985) 39 Cal.3d 836, 844 [enacting body deemed aware of existing laws and judicial constructions in effect at time legislation is enacted]; In re Lance W. (1985) 37 Cal.3d 873, 890, fn.11 [principle applies to legislation enacted by initiative].) Further, "[i]t is a well-recognized rule of construction that after the courts have construed the meaning of any particular word, or expression, and the legislature subsequently undertakes to use these exact words in the same connection, the presumption is almost irresistible that it used them in the precise and technical sense which had been placed upon them by the courts." (City of Long Beach v. Payne (1935) 3 Cal.2d 184, 191.) The presumption is equally applicable to measures adopted by popular vote. (Perry v. Jordan (1949) 34 Cal.2d 87, 93; see also In re Jeanice D. (1980) 28 Cal.3d 210, 216.)

When the people passed Proposition 7, murder was defined as "the unlawful killing of a human being, or a fetus, with malice aforethought" and was divided into first-degree and second-degree murder. All murder that is not murder in the first-degree as defined in section 189, was murder in the second-degree. (Pen. Code, §§ 187, 189.) First-degree felony murder, originally codified in California in 1850 from the common law rule, was defined as a killing "committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288." (Pen. Code, § 189; People v. Dillon (1983) 34 Cal.3d 441, 472.)

In addition to the statutory definitions of first-degree and second-degree murder in

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controversy here.

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existence at the time Proposition 7 was passed, voters were presumed aware that California courts had long-construed the murder statutes to apply to defendants where the malice necessary for murder was imputed to a defendant – either the direct perpetrator of the killing or his or her accomplice – based solely on his or her participation in a crime. Second-degree felony murder had been judicially recognized as early as 1964. (People v. Ford (1964) 60 Cal.2d 772, 795 ["Homicide that is a direct causal result of the commission of a felony inherently dangerous to human life (other than the six felonies enumerated in Pen. Code, § 189) constitutes at least second-degree murder."].) Both conspirator liability and the natural and probable consequences doctrine as applied to murder was first judicially recognized in 1907. (People v. Kauffman (1907) 152 Cal. 331, 334 [". . . [W]here several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."].) And finally, "provocative act murder" was recognized by our Supreme Court as early as 1965. (People v. Washington (1965) 2 Cal.2d 777, 782 ["Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill."].)

Thus, when the voters passed Proposition 7, they specifically intended to increase the penalty for defendants convicted of either first or second-degree murder as it was then defined and long-recognized by California courts. S.B. 1437 now unconstitutionally seeks to prevent the imposition of voter-approved 15 years-to-life or 25 years-to-life sentences; instead, it mandates resentencing to terms far below that which was mandated by the people. Because the California Constitution requires that such action be approved by the voters, S.B 1437's legislative

prohibition of voter-approved sentences is unconstitutional.

2. Senate Bill 1437 Amended Penal Code Section 188 Eliminating Imputed Malice Murder Constructions, and Penal Code Section 189, Requiring Additional Conduct to be Held Liable for First-Degree Felony Murder, Both of Which Amend Proposition 7 by Narrowing Its Scope

Quackenbush and Mobilepark support the invalidation of S.B. 1437. Proposition 7 "broadened the class of persons subject to the most severe penalties known to our criminal law" (Weidert, supra, 39 Cal.3d at p. 844), yet S.B. 1437 narrows the scope of Proposition 7 by expressly limiting who can be convicted and punished for first and second-degree murder by adding requirements for murder liability not previously required by eliminating imputed malice and by adding new affirmative requirements for felony-murder liability. (see Kelly, supra, 47 Cal.4th at p. 1026; Quackenbush, supra, 64 Cal.App.4th at pp. 1485-1486.)

S.B. 1437 amends Penal Code section 188 non-substantively by reorganizing it and breaking the section down into separate subdivisions. It amends section 188 substantively by adding subdivision (3), which states, "[e]xcept as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

The bill likewise amends Penal Code section 189 non-substantively by breaking that section down into subdivisions and incorporating specific statutory definitions for the terms used within it. It amends section 189 substantively by adding subdivision (e), which reads:

> (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
> (1) The person was the actual killer.
> (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
> (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

Proposition 7 mandated life sentences for *all* defendants who could be convicted of first or second-degree murder as defined by statute and which had been judicially construed at the time the initiative was passed, including first-degree felony murder, second-degree felony murder, murder under co-conspirator and natural and probable consequences doctrines, and provocative act murder. Each theory imputes the implied malice necessary for murder onto the defendant based on his or her participation in a crime that results in murder. The effect of the substantive amendments to Penal Code sections 188 and 189 is to reduce the total number of individuals eligible for punishment for first or second-degree murder by eliminating long-standing judicial constructions in existence when Proposition 7 was passed and by redefining who can be liable for first-degree murder under the felony murder rule. Indeed, the exact intended effect as stated in section one of the bill was to ". . . limit convictions and subsequent sentencing . . . and assist[] in the reduction of prison overcrowding . . ." (Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 1, subd. (e), p. 2.) Not only does S.B. 1437 change the effect of Proposition 7 in the manner explained in Quackenbush, it changes the full scope and reach of Proposition 7 in the manner explained in Mobilepark. This cannot be done without a vote of the people.

It is unambiguous that Proposition 7 set the penalties for murder, which may not be changed by the Legislature unilaterally. The amendments to Penal Code sections 188 and 189 effectively change the penalties for murder by changing who may be prosecuted for murder as defined in 1978. The Legislature cannot do indirectly which it may not do directly, and as a result, the changes are unconstitutional.

To determine exactly how S.B. 1437 changes the scope of Proposition 7, it is necessary to first examine the voters' intent in promulgating and passing the initiative; that is, how far a reach did the voters want the initiative to have? Did the voters really want the increased punishments

for murder to reach everyone who could be convicted of first or second-degree murder, as it existed at the time, to the extent that they wished to bind future legislatures and prevent that body from limiting those eligible for the punishments set by the initiative?

The subject of Proposition 7 was the penalties for murder, both prison and the death penalty. Adding Penal Code section 190, the voters stated: "[e]very person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life," and "[e]very person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life." (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), § 2.) When compared to then existing law, 7 years-to-life for first-degree murder, and a triad of 5 years/6 years/7 years for second-degree murder, Proposition 7 significantly increased the penalties for individuals who commit murder.

Proposition 7 spoke of accomplices as well. With respect to its special circumstances provisions, Proposition 7 eliminated the requirement that both principals and accomplices be personally present during the commission of the act or acts causing death. (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), §§ 5, 11 [repealing section 190.2 and 190.5, specifically 190.2, subd. (d) and 190.5, subd. (b)].) The then-existing limitation of accomplice liability to defendants who physically aided the act or acts causing death was also eliminated. (Ibid.) With respect to the mental state, whether for a direct perpetrator or an accomplice, Proposition 7 added to the list of special circumstances in Penal Code sections 190.2, subdivisions (a)(4) and (a)(6). The sections have a mental state quite different, and less exacting, than S.B. 1437, i.e., "the defendant knew or reasonably should have known that his act or acts would create a great risk of death . . .." (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), § 6, subds. (a)(4) and (a)(6).) This mental state is of a lesser degree than S.B. 1437 requires for an accomplice to first-

degree felony murder under Penal Code section 189, subdivision (e). Proposition 7 also added the special circumstance of Penal Code section 190.2(a)(5) which requires no form of malice at all: "[t]he murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody." (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), § 6, subd. (a)(5).) Additionally, Proposition 7 deleted the requirement that a felony murder be willful, deliberate, and premeditated. (Prop. 7, as approved by voters, Gen. Elec. (Nov. 7, 1978), § 6, subd. (a)(17) [compare to former §190.2, subd. (c)(3)].) Put simply, S.B. 1437 frustrates the relatively lesser mental state requirements for the special circumstances in Penal Code section 190.2, subdivisions (a)(4), (a)(5), (a)(6) and (a)(17) by requiring a greater mental state for first-degree murder than was required when Proposition 7 was overwhelmingly passed by the voters.

"Ballot pamphlet arguments have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote. [citations.]" (People v. Yearwood (2013) 213 Cal.App.4th 161, 171; see also Santos v. Brown (2015) 238 Cal.App.4th 398, 410; People v. Shabazz (2015) 237 Cal.App.4th 303, 313.) Likewise, ballot explanations by the Legislative Analyst are also a source of construing voter intent. (In re Lance W., supra, 37 Cal.3d at p. 888; People v. Walker (2016) 5 Cal.App.5th 872, 877.)

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. [citations.]" (In re Lance W., supra, 37 Cal.3d at p. 889; see also People v. Rivera (2015) 233 Cal.App.4th 1085, 1099-1100.) " '[I]n the case of a voters' initiative statute ... we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' " (Robert L. v. Superior Court (2003) 30 Cal.4th 894, 909, quoting Hodges v. Superior Court (1999) 21 Cal.4th 109, 114; see also People v. Rocco (2012)

209 Cal.App.4th 1571, 1575.)

"[R]ules of statutory construction are the same whether applied to the California Constitution or a statutory provision (Winchester v. Mabury (1898) 122 Cal. 522, 527), and '[t]he same rules of interpretation should apply to initiative measures enacted as statutes.' (Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal.App.3d 661, 672.)" (People v. Bustamante (1997) 57 Cal.App.4th 693, 699, fn. 5; see also People v. Estrada (2017) 3 Cal.5th 661, 668; People v. Rizo (2000) 22 Cal.4th 681, 685.)

> "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (People v. Superior Court (Pearson) (2010) 48 Cal.4th 564, 571; see also People v. Arroyo (2016) 62 Cal.4th 589, 593; People v. Scarbrough (2015) 240 Cal.App.4th 916, 922-923.)

The ballot argument in favor of Proposition 7 was an argument for a strong response to violent crime with severe penalties, including the death penalty. It highlighted the "deadly plague of violent crime which terrorizes law-abiding citizens" and criticized the Legislature for passing penalties that are "weak and ineffective." The argument speaks to a desire to have the "nation's toughest, most effective" penalties for murder and notes that "judges and law enforcement officials have agreed that Proposition 7 will provide them with a powerful weapon of deterrence in their war on violent crime." (Voter Information Guide for 1978, General Election (1978).) It passed with 71.1 percent of the vote[3].

The concern expressed in the arguments, together with the significant changes made to the penalties for murder, make clear the intent of the electorate to secure the community against

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3 UC Hastings Scholarship Repository, Murder. Penalty California Proposition 7 (1978), http://repository.uchastings.edu/ca_ballot_props/840.

violent crime by imposing longer prison terms or the death penalty on defendants who were convicted of murder. Under no reading of the arguments, the Legislative Analyst's discussion, or the proposition itself, did the people express a willingness or desire to permit the legislature to re-define what is required for murder so as to narrow the range of offenders to which it would apply. (see Robert L., supra, 30 Cal.4th at p. 909 [noting that in Hodges, supra, 21 Cal.4th at p. 114, the court stated: "we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less," internal quotations omitted].)

So significant was the electorate's disdain for legislative weakness in establishing murder penalties, as demonstrated by the ballot arguments, that the proposition was drafted to exclude authority for any future legislature to make changes to the effect or scope of the measures, regardless of the percentage of votes the legislature might garner, unless those changes were approved by the people. Today's Legislature, however, has ignored the will of the people by single-handedly changing Penal Code sections 188 and 189 without voter approval. It has further ignored the Legislative Counsel's advice in pursuit of this unconstitutional assertion of legislative primacy over the voters' will. While the legislature is free to disagree with the voters as a matter of policy, they are not free to amend voter initiatives except upon approval of the initiative itself, or by a vote of the electorate.

3. Any Amendments to Proposition 7 Require Voter Approval

The power vested in the electorate to decide whether the Legislature can amend an initiative statute is absolute. (Amwest Surety Ins. Co. v. Wilson (1995) (Amwest) 11 Cal.4th 1243, 1251.) Proposition 7 did not reserve power to amend its provisions to the legislature. Therefore, any legislative statutes which amend Proposition 7 require voter approval. (Cal. Const., art. II, § 10.) S.B. 1437 amended Proposition 7 and was not approved by the voters. It is

therefore unconstitutional, and must be stricken.

iii. SENATE BILL 1437 UNCONSITUTIONALLY AMENDS PROPOSITION 115

California voters passed Proposition 115, known as the Crime Victim's Reform Act (hereinafter "Proposition 115"). Among the goals of the people in enacting Proposition 115 was to "create a system in which violent criminals receive just punishment. . . . and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools." (see Exhibit E – relevant pages from Voter Information Guide for 1990 Primary (1990), text of Prop. 115, § 1, subd. (c), p. 33; also available at: https://repository.uchastings.edu/ca_ballot_props/1020/.) To that end, and among other things, Proposition 115 amended Penal Code section 189 expanding the definition of first-degree murder to include murder committed during the commission or attempted commission of five additional serious crimes. (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 9.)

Proposition 115 also amended Proposition 7, expanding its scope by increasing the overall number of individuals eligible for punishment for first-degree felony murder. However, unlike S.B. 1437, the voters approved the change to Proposition 7's scope when they approved Proposition 115. Proposition 115 in turn reserved power to amend its provisions to the legislature, but only "by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 30.)

Section 3 of S.B. 1437 amended Penal Code section 189 by adding subdivisions (e) as outlined above, and (f), which precludes the application of subdivision (e) if the murder victim is

a police officer killed in the course of his or her duties.[4] By its terms, Proposition 115 requires either voter approval or a 2/3 vote in both houses to make this change, since Penal Code section 189 is a "statutory provision[] contained in this measure." (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 30.)

The defense may argue that Proposition 115 had no effect on the remainder of Penal Code section 189 because Proposition 115 did not change section 189 except to add crimes to the list of crimes for first-degree murder. It is true that the California Constitution requires existing law be restated within an initiative so that voters may understand what is being changed (Cal. Const., art. IV, § 9), and that when doing so, such a restatement does not in most cases prevent the legislature from amending the restated language. However, the California Supreme Court added that "[t]his conclusion applies *unless* the provision is integral to accomplishing the electorate's goals in enacting the initiative or other indicia support the conclusion that voters reasonably intended to limit the Legislature's ability to amend that part of the statute." (Commission on State Mandates, supra, 6 Cal.5th at p. 214, italics in original.) Additionally, the language chosen by the electors in Proposition 115 was quite clear:

> The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by roll call vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective when approved by the electors. (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 30.)

In Commission on State Mandates, the state was attempting to get out from under its obligation to reimburse counties for costs associated with certain aspects of civil commitment proceedings for sexually violent predators under The Sexually Violent Predators Act (SVPA; Welf. & Inst. Code, § 6600 et seq.), claiming that the 2006 voter-enacted Sexual Predator

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4 This is the only constitutional portion of S.B. 1437, because it is written to preserve the status of existing law with respect to peace officer murders.

Punishment and Control Act: Jessica's Law (hereinafter "Proposition 83") substantively amended and reenacted various statutes that served as the basis for the reimbursement mandate and therefore costs previously associated with SVPA proceedings were no longer a state mandate requiring reimbursement, but a voter mandate with costs to be borne by the counties. (Commission on State Mandates, supra, 6 Cal.5th at pp. 200-201.) At issue was whether the statutes that had been amended by Proposition 83, and then reenacted in full as amended as required by the constitution, did in fact make substantive changes to the SVPA or were merely technical. The Court held they had not. (Commission on State Mandates, supra, 240 Cal.Rptr.3d at p. 201.) The Court went to some length to emphasize that its holding pertained to the wholesale reenactment of a statute without substantive change. It spoke of the underlying purposes of Proposition 83, which had re-enacted the SVP provisions but did not focus "on duties local governments were already performing under the SPVA." (Id. at p. 213.) By way of contrast, the Court looked at Shaw v. People ex rel. Chiang 175 Cal.App.4th 577, where legislative deviations of money from a trust fund created by Proposition 116 were improper amendments of the electorate's enactment outside of the proposition's authorization. The Court in Commission on State Mandates said this sought "to undo the very protections the voters had enacted" (6 Cal. 5th at p. 213) and went to "the heart of a voter initiative" (Id. at p. 212).

Relevant to the argument here, it was noted by the court in Commission on State Mandates that Proposition 83 did expand the definition of a sexually violent predator, and "[a]lthough the SVP definition does not *itself* impose any particular duties on local governments, it is necessarily incorporated into each of the listed activities. Indeed, whether a county has a duty to act (and, if so, what it must do) depends on the SVP definition." (Commission on State Mandates, supra, 6 Cal.5th at pp. 216-217, italics in original.) The Court, therefore, remanded the matter to the Commission to determine whether and how the initiative's expanded definition

of an SVP may affect the state's obligation to reimburse the Counties for implementing the amended statute. (Id. at p. 201.) Thus, the question was left open whether amending the statute to broaden the definition of an SVP, resulting in a larger group of individuals who could be subject to the law thus triggering a county's duty to act is a substantive change.

Proposition 115 amended Penal Code section 189 to add five additional serious felonies to the felony murder rule, including kidnapping, sodomy, oral copulation of a minor, forced sexual penetration, and train wrecking. At the time it was passed, these provisions would apply to an aider and abettor in a first-degree murder, whether or not the defendant was the actual killer, acted with the intent to kill, or was a major participant who acted with reckless indifference to human life. (see Pen. Code, § 189, compared to Pen. Code, § 189, subd. (e) as amended by S.B. 1437.) Because Proposition 115 directly amended section 189, and because S.B. 1437 substantially changes to whom Penal Code section 189 may apply by requiring additional elements be proven for accomplices that were not included in Proposition 115's version of Penal Code section 189, S.B. 1437 is also violative of the amendment provisions of Proposition 115. Any other interpretation would require one to conclude that when adding the five additional felonies to Penal Code section 189, thus necessitating a 25-years-to-life sentence, and eligibility for death or life without parole if a special circumstance was alleged and proven, that the voters were entirely indifferent to the Legislature undermining the amendments by adding significant additional requirements for those very same offenses (kidnapping, sodomy, oral copulation of a minor, forced sexual penetration, and train wrecking). This strains credulity. It is especially suspect given the command that "the statutory provisions contained in this measure *may not be amended by the Legislature except*" subject to a two-thirds majority in each house or a vote of the people. (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 30, italics added.)

Proposition 115 did not merely re-enact Penal Code section 189 as required by the Constitution to make minor technical, non-substantive changes to it. Rather, the heart of Proposition 115 focused on the fact that "the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system." (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 1, subd. (a).) Furthermore, "[t]he goals of the people in enacting this measure are . . . to create a system in which violent criminals receive just punishment, . . . and in which society as a whole can be free from fear of crime in our homes, neighborhoods, and schools." (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 1, subd. (c).) Removing culpability from felony murder cannot be said to be anything other than at odds with those goals. Proposition 115 also added Penal Code section 190.2, subdivisions (c) and (d) (Crime Victims Justice Reform Act, Gen. Elec. (June 5, 1990) text of Prop. 115, § 9.), which contained language for accomplices that is nearly identical to S.B. 1437, section 3, subdivision (e) (codified at Pen. Code, § 189, subd. (e)), except that Proposition 115 only required those additional elements for sentences of Life Without the Possibility of Parole or the Death Penalty, not for first-degree murder by accomplices. Had the voters wanted the additional requirements for accomplices to apply to Penal Code section 189, they would have codified it as such. The Legislature was not free to impose that choice in S.B. 1437, except upon compliance with article II, section 10 of the California Constitution.

Since the amendment to section 189 contained in Proposition 115 was a substantive one, any further substantive changes to Penal Code section 189 requires two-thirds approval vote in both houses as mandated by Proposition 115. S.B. 1437 thereafter substantively changed Section 189, and did so without the necessary two-thirds approval vote in both houses. (see Exhibit F –

Sen. Bill No. 1437 (2017-2018 Reg. Sess), Votes.)[5] It is therefore an unconstitutional amendment and must be stricken.

As further evidence that Proposition 115 is violated, it must be noted that there is a distinction between the limiting language in Proposition 115 – "the statutory provisions contained in this measure may not be amended" – and the more commonly used language used in most propositions to limit amendments to its provisions – "[t]he provisions of this act shall not be amended by . . ."[6] Notwithstanding the general rule that mere restatement of existing language in a statute as required by the Constitution (Cal. Const., art. IV, § 9) does not prevent legislative amendment (see Commission on State Mandates, supra, 6 Cal.5th at p. 214), the electorate has the power to prevent an amendment to any statute it chooses to include in the initiative. To make this clear, if the voters (knowing about the general rule) nonetheless wished to insulate existing language in a murder statute, how might they do it? Merely stating "the provisions of this act" shall not be amended would not be sufficient because the voters are assumed to be aware that this language must be read in light of the general rule. On the other hand, if voters did not want the legislature to be able to amend any of the specific statutes included in the initiative, without regard to how much of the language of the statute was changed and regardless of the general rule, the initiative would say exactly what Proposition 115 states:

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5 Sen. Bill No. 1437 (2017-2018 Reg. Sess), Votes, at http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB1437.

6 Only three other initiatives appear to use language identical to that found in Proposition 115. (see Proposition 139 (enacted in 1990), Proposition 187 (enacted in 1994), and Proposition 9 (enacted in 1990.) The vast majority of initiatives use language similar to "[t]he provisions of this act shall not be amended by . . . ."

"the statutory provisions contained in this measure may not be amended . . ."

Proposition 115 reserved the power to amend its statutory provisions to the legislature, but only if it passed by 2/3 vote in both houses or was approved by the electorate. With its changes to Penal Code section 189, S.B. 1437 amended Proposition 115 without the required votes, and is therefore unconstitutional and must be stricken.

California voters have stated time and again that they are in favor of imposing increased and lengthy prison terms for murderers, as well as protecting the rights of victims to a prompt and final conclusion to cases. The passage of Senate Bill 1437 attempts to thwart the will of the voters in a manner that does not pass Constitutional muster. As of the writing of the motion, at least one court in California has found S.B. 1437 to be unconstitutional (see Exhibit G). As such, Senate Bill 1437 is unconstitutional, and the People are asking the court set aside the plea agreement.

B. THE COURT SHOULD SET ASIDE NEKO WILSON'S PLEA AGREEMENT

Plea bargains are interpreted according to contract principles, and a mistake of law should entitle the prosecutor to have the court vacate the plea agreement and restore the parties to the same position as before the plea. See People v. Superior Court (Sanchez) (2014) 223 Cal.App.4th 567.

The People entered in to a plea agreement with Neko Wilson under the belief that S.B. 1437 was constitutional. The People now believe that S.B. 1437 is unconstitutional for the reasons stated above. The People would not have entered in to the plea agreement with Neko Wilson but for the passage of S.B. 1437. The People believe it is within the Court's discretion to set aside the plea if the Court deems S.B. 1437 unconstitutional. Therefore, the People are asking the

Court to deem S.B. 1437 unconstitutional, and further to exercise its discretion and set aside the plea.

C. IF THE COURT DENIES THE PEOPLE'S MOTION TO SET ASIDE THE PLEA, THE COURT SHOULD SENTENCE NEKO WILSON TO THE MAXIMUM TIME ALLOWABLE UNDER THE PLEA AGREEMENT

Here, Neko Wilson's plea agreement provides that he can be sentenced up to a maximum term of nine years in state prison. The Probation reports recommends a sentence of eight years. The People agree with that recommendation for the felony cases. However, it appears the probation report does not account for the plea in case M09800410. The defendant is eligible for a consecutive year in custody in that case. Therefore, assuming the court denies the motion to set aside the plea, the People ask the court to sentence the defendant to a consecutive year in that case for a total of nine years.

IV.
CONCLUSION

The People respectfully request that the Court set aside Defendant Wilson's plea.

DATED: March 6, 2019

Respectfully submitted,

Lisa A. Smittcamp
District Attorney

By: _____
William Lacy
Sr. Deputy District Attorney

Exhibit A

AMENDED IN ASSEMBLY MARCH 22, 2018

CALIFORNIA LEGISLATURE—2017–18 REGULAR SESSION

ASSEMBLY BILL No. 3104

Introduced by Assembly Member Cooper

February 16, 2018

An act to amend ~~Section 189 of~~ *Sections 189, 190, and 190.2 of, and to add Sections 190.01 and 1170.127 to,* the Penal Code, relating to crimes.

LEGISLATIVE COUNSEL'S DIGEST

AB 3104, as amended, Cooper. Murder.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law, as amended by Proposition 115 as approved by the voters at the June 5, 1990, statewide primary election, requires the sentence of life without the possibility of parole or death to be imposed when specified special circumstances have been found to be true, including when the murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, specified felonies. Existing law, also as amended by Proposition 115, requires that every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits,

requests, or assists in the commission of an enumerated felony that results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, be punished by death or imprisonment in the state prison for life without the possibility of parole.

Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

~~Existing law, as amended by Proposition 115 as approved by the voters at the June 5, 1990, statewide primary election, provides that a murder committed by certain means or under certain circumstances is murder in the first degree, and all other kinds of murder are of the second degree.~~ The Legislature may amend Proposition 115 by a statute passed in each house by rollcall vote entered in the journal, ⅔ of the membership concurring, or by a statute that becomes effective only when approved by the electors.

~~*This bill would amend various propositions by limiting the sentence for specified instances of first degree murder to 25 years to life, specifically where the person is not the actual killer but acts with specified intent. The bill would define as 2nd degree murder, punishable by 15 years to life in state prison, a person who is not the actual killer and who does not act with reckless indifference to human life and is not a major participant in the crime, but who aids, abets, counsels, commands, induces, solicits, requests, or assists an actor in the commission or attempted commission of an enumerated crime that results in the death of a person.*~~

This bill would provide a means for a person to petition for recall and resentencing when he or she was sentenced to an indeterminate term of imprisonment in the state prison for life without the possibility of parole when he or she was not the actual killer, did not act with reckless indifference to human life, and was not a major participant in the underlying felony. The bill would require the petitions for recall and resentencing to be filed on or before January 1, 2024.

~~This bill would make technical, nonsubstantive changes to that provision.~~

Vote: ~~majority~~ ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

Exhibit B

LEGISLATIVE COUNSEL BUREAU

A TRADITION OF TRUSTED LEGAL SERVICE TO THE CALIFORNIA LEGISLATURE

LEGISLATIVE COUNSEL BUREAU
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June 20, 2018

Honorable Jim Cooper
Room 6025, State Capitol

FELONY MURDER ACCOMPLICE LIABILITY - #1813978

Dear Mr. Cooper:

Pursuant to your request, we have prepared the enclosed measure relating to the accomplice liability for felony murder.

The proposed measure, if enacted, would prohibit malice, for purposes of a conviction of murder, from being implied based solely on a person's participation in a crime (Sec. 1; Sec. 188, Pen. C.). Additionally, the proposed measure would prohibit a participant in the perpetration or attempted perpetration of one of the felonies that can result in a conviction for first degree murder if a death occurs, from being liable for murder, unless the person was the actual killer; was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer; or the person was a major participant in the underlying felony and acted with reckless indifference to human life (Sec. 2; Sec. 189, Pen. C.). The effective result of the proposed measure would be to reduce the number of people who could be convicted of murder and, instead, make those people eligible for conviction only for the underlying felony offense.

Section 190 of the Penal Code (Section 190), enacted by Proposition 7, which was adopted by the voters in the June 5, 1978, statewide general election, established increased sentences for the commission of first degree and second degree murder. The courts generally presume that the voters were aware of existing law at the time of approving the initiative, including the definition of the crime for which they were imposing a sentence (see, for example *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048 (voters presumed to be aware of existing law when they approve a ballot proposal)). Relevant to this measure, Section 189 of the Penal Code at the time the voters enacted Proposition 7 enumerated a discreet list of actions for which an individual could be convicted of first degree murder, including felony murder. Thus, by enacting Proposition 7 the voters

contemplated that felony murder, and the accomplice liability for felony murder, would be punishable according to the increased penalty enacted by the initiative.

The California Constitution authorizes the Legislature to amend or repeal an initiative statute only by a statute that becomes effective when approved by the electors, unless the initiative statute permits amendment or repeal without their approval (see subd. (c), Sec. 10, Art. II, Cal. Const.). A legislative proposal constitutes an amendment of an initiative statute if it changes the scope or effect of the initiative (*Proposition 103 Enforcement Project v. Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1485). Proposition 7 does not permit amendment by the Legislature, and thus any amendment would have to be submitted to the voters to become effective.

The legal effect of your proposed measure would be to reduce the number of people who could be convicted of murder and, instead, make those people eligible for conviction only for the underlying offense, for which a different sentence applies. Thus, the proposed measure constitutes an amendment of Proposition 7 because it changes the scope and definition of murder on which the voters relied when enacting Section 190 by initiative in 1978. As such, the proposed measure requires the approval of the electors to become effective, in compliance with Section 10 of Article II of the California Constitution.

If you wish further assistance with this measure, please contact the undersigned deputy.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

Sharon L Everett

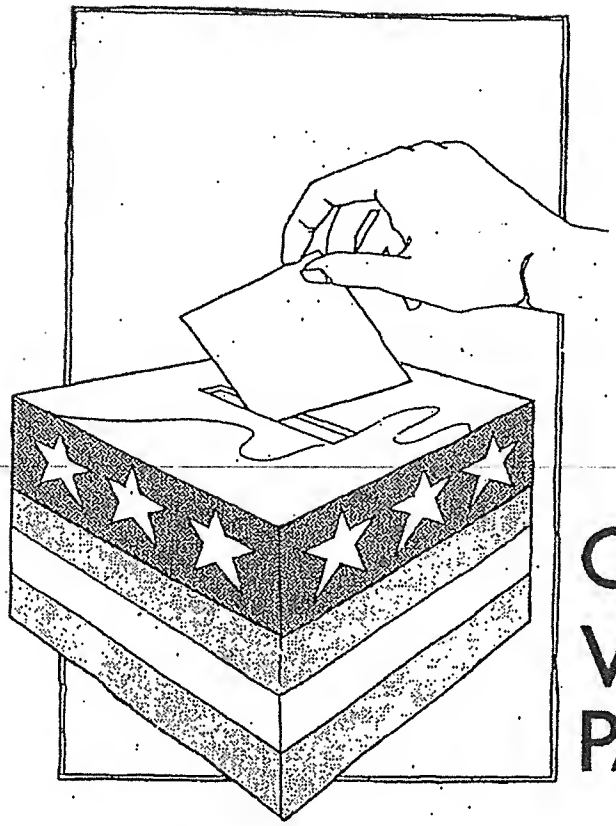
By
Sharon L. Everett
Deputy Legislative Counsel

DF26
SLE:rah

Exhibit C

1978

Voter Information Guide for 1978, General Election



CALIFORNIA VOTERS PAMPHLET

GENERAL ELECTION NOVEMBER 7, 1978

COMPILED BY MARCH FONG EU · SECRETARY OF STATE
ANALYSES BY WILLIAM G. HAMM · LEGISLATIVE ANALYST

AVISO

Una traducción al español de este folleto del votante puede obtenerse si completa y nos envía la tarjeta con porte pagado que encontrará entre las páginas 24 y 25. Escriba su nombre y dirección en la tarjeta en LETRA DE MOLDE y regrésela a más tardar el 27 de octubre de 1978.

NOTICE

A Spanish translation of this ballot pamphlet may be obtained by completing and returning the postage-paid card which you will find between pages 24 and 25. Please PRINT your name and mailing address on the card and return it no later than October 27, 1978.

7 Murder. Penalty—Initiative Statute

Official Title and Summary Prepared by the Attorney General

MURDER. PENALTY. INITIATIVE STATUTE. Changes and expands categories of first degree murder for which penalties of death or confinement without possibility of parole may be imposed. Changes minimum sentence for first degree murder from life to 25 years to life. Increases penalty for second degree murder. Prohibits parole of convicted murderers before service of 25 or 15 year terms, subject to good-time credit. During punishment stage of cases in which death penalty is authorized: permits consideration of all felony convictions of defendant; requires court to impanel new jury if first jury is unable to reach a unanimous verdict on punishment. Financial impact: Indeterminable future increase in state costs.

Analysis by Legislative Analyst

Background:

Under existing law, a person convicted of *first degree murder* can be punished in one of three ways: (1) by death, (2) by a sentence of life in prison without the possibility of parole, or (3) by a life sentence with the possibility of parole, in which case the individual would become eligible for parole after serving seven years. A person convicted of *second degree murder* can be sentenced to 5, 6, or 7 years in prison. Up to one-third of a prison sentence may be reduced through good behavior. Thus, a person sentenced to 6 years in prison may be eligible for parole after serving 4 years.

Generally speaking, the law requires a sentence of death *or* life without the possibility of parole when an individual is convicted of first degree murder under one or more of the following special circumstances: (1) the murderer was hired to commit the murder; (2) the murder was committed with explosive devices; (3) the murder involved the killing of a specified peace officer or witness; (4) the murder was committed during the commission or attempted commission of a robbery, kidnapping, forceable rape, a lewd or lascivious act with a child, or first degree burglary; (5) the murder involved the torture of the victim; or (6) the murderer has been convicted of more than one offense of murder in the first or second degree. If any of these special circumstances is found to exist, the judge or jury must "take into account and be guided by" aggravating or mitigating factors in sentencing the convicted person to either death or life in prison without the possibility of parole. "Aggravating" factors which might warrant a death sentence include brutal treatment of the murder victim. "Mitigating" factors, which might warrant life imprisonment, include extreme mental or emotional disturbance when the murder occurred.

Proposal:

This proposition would: (1) increase the penalties for first and second degree murder, (2) expand the list of special circumstances requiring a sentence of either death or life imprisonment without the possibility of parole, and (3) revise existing law relating to mitigating or aggravating circumstances.

The measure provides that individuals convicted of first degree murder and sentenced to life imprisonment shall serve a minimum of 25 years, less whatever credit for good behavior they have earned, before they can be eligible for parole. Accordingly, anyone sentenced to life imprisonment would have to serve at least 16 years and eight months. The penalty for second degree murder would be increased to 15 years to life imprisonment. A person sentenced to 15 years would have to serve at least 10 years before becoming eligible for parole.

The proposition would also expand and modify the list of special circumstances which require either the death penalty or life without the possibility of parole. As revised by the measure, the list of special circumstances would, generally speaking, include the following: (1) murder for any financial gain; (2) murder involving concealed explosives or explosives that are mailed or delivered; (3) murder committed for purposes of preventing arrest or aiding escape from custody; (4) murder of any peace officer, federal law enforcement officer, fireman, witness, prosecutor, judge, or elected or appointed official with respect to the performance of such person's duties; (5) murder involving particularly heinous, atrocious, or cruel actions; (6) killing a victim while lying in wait; (7) murder committed during or while fleeing from the commission or attempted commission of robbery, kidnapping, specified sex crimes (including those sex crimes that now represent "special circumstances"), burglary, arson, and trainwrecking; (8) murder in which the victim is tortured or poisoned; (9) murder based on the victim's race, religion, nationality, or country of origin; or (10) the murderer has been convicted of more than one offense of murder in the first or second degree.

Also, this proposition would specifically make persons involved in the crime other than the actual murderer subject to the death penalty or life imprisonment without possibility of parole under specified circumstances.

Finally, the proposition would make the death sentence *mandatory* if the judge or jury determines that the aggravating circumstances surrounding the crime *outweigh* the mitigating circumstances. If aggravating circumstances are found *not* to outweigh mitigating circumstances, the proposition would require a life sentence without the possibility of parole. Prior to weighing the aggravating and mitigating factors, the jury

would have to be informed that life without the possibility of parole might at a later date be subject to commutation or modification, thereby allowing parole.

Fiscal Effect:

We estimate that, over time, this measure would increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system.

The increase in the prison population would result from:

- the longer prison sentences required for first degree murder (a minimum period of imprisonment equal to 16 years, eight months, rather than seven years);
- the longer prison sentences required for second degree murder (a minimum of ten years, rather than four years); and
- an increase in the number of persons sentenced to life without the possibility of parole.

There could also be an increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population. However, the number of persons executed as a result of this measure would be significantly less than the number required to serve longer terms.

The Department of Corrections states that a small number of inmates can be added to the prison system at a cost of $2,575 per inmate per year. The additional costs resulting from this measure would not begin until 1983. This is because the longer terms would only apply to crimes committed after the proposition became effective, and it would be four years before any person served the minimum period of imprisonment required of second degree murderers under existing law.

Text of Proposed Law

This initiative measure proposes to repeal and add sections of the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Section 1. Section 190 of the Penal Code is repealed.

~~190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.~~

Sec. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

Sec. 3. Section 190.1 of the Penal Code is repealed.

~~190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:~~

~~(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.~~

~~(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.~~

~~(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.~~

Sec. 4. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is

Continued on page 41

7 Murder. Penalty—Initiative Statute

Argument in Favor of Proposition 7

CHARLES MANSON, SIRHAN SIRHAN, THE ZODIAC KILLER, THE SKID-ROW SLASHER, THE HILLSIDE STRANGLER.

These infamous names have become far too familiar to every Californian. They represent only a small portion of the deadly plague of violent crime which terrorizes law-abiding citizens.

Since 1972, the people have been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law has been thwarted by powerful anti-death penalty politicians in the State Legislature.

In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible.

That is why 470,000 concerned citizens signed petitions to give you the opportunity to vote on this new, tough death penalty law.

Even if the President of the United States were assassinated in California, his killer would not receive the death penalty in some circumstances. Why? Because the Legislature's weak death penalty law does not apply. Proposition 7 would.

If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. Why? Because the Legislature's death penalty law does not apply to the master mind of a murder such as Manson. Proposition 7 would.

And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

Proposition 7 would also apply to the killer of a judge, a prosecutor, or a fireman. It would apply to a killer who murders a citizen in cold blood because of his race or religion or nationality. And, it would apply to all situations which are covered by our current death penalty law.

In short, your YES vote on Proposition 7 will give every Californian the protection of the nation's toughest, most effective death penalty law.

A long and distinguished list of judges and law enforcement officials have agreed that Proposition 7 will provide them with a powerful weapon of deterrence in their war on violent crime.

Your YES vote on Proposition 7 will help law enforcement officials to stop violent crime—NOW.

JOHN V. BRIGGS
Senator, State of California
35th District

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

DUANE LOWE
President, California Sheriffs' Association
Sheriff of Sacramento County

Rebuttal to Argument in Favor of Proposition 7

The argument for Proposition 7 is strictly false advertising.

- It would not affect the Charles Manson and Sirhan Sirhan cases. They were sentenced under an old law, thrown out by the courts because it was improperly written.
- As for the "zodiac killer", "hillside strangler" and "skid-row slasher", *they were never caught.* Even the nation's "toughest" death penalty law cannot substitute for the law enforcement work necessary to apprehend suspects still on the loose.

But you already know that.

Regardless of the proponents' claim, no death penalty law—neither Proposition 7 nor the current California law—can guarantee the *automatic* execution of all convicted murderers, let alone suspects not yet apprehended.

California has a strong death penalty law. Two-thirds of the Legislature approved it in August, 1977, after months of careful drafting and persuasive lobbying by law enforcement officials and other death penalty advocates.

The present law is *not* "weak and ineffective" as claimed by Proposition 7 proponents. It applies to murder cases like the ones cited.

Whether or not you believe that a death penalty law is necessary to our system of justice, you should vote NO on Proposition 7. It is so confusing that the courts may well throw it out. Your vote on the murder penalty initiative will not be a vote on the death penalty; it will be a vote on a carelessly drafted, dangerously vague and possibly invalid statute.

Don't be fooled by false advertising. READ Proposition 7. VOTE NO.

MAXINE SINGER
President, California Probation, Parole and Correctional Association

NATHANIEL S. COLLEY
Board Member, National Association for the Advancement of Colored People

JOHN FAIRMAN BROWN
Board Member, California Church Council

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Murder. Penalty—Initiative Statute 7

Argument Against Proposition 7

DON'T BE FOOLED BY FALSE ADVERTISING. The question you are voting on is NOT whether California should have the death penalty. California ALREADY has the death penalty.

The question is NOT whether California should have a tough, effective death penalty. California ALREADY has the death penalty for more different kinds of crimes than any other State in the country.

The question you are voting on is whether to repeal California's present death-penalty law and replace it with a new one. Don't be fooled by false advertising. If somebody tried to sell you a new car, you'd compare it with your present automobile before paying a higher price for a worse machine.

Whether or not you agree with California's present law, it was written carefully by people who believed in the death penalty and wanted to see it used effectively. It was supported by law enforcement officials familiar with criminal law.

The new law proposed by Proposition 7 is written carelessly and creates problems instead of solving them. For example, it does not even say what happens to people charged with murder under the present law if the new one goes into effect.

As another example, it first says that "aggravating circumstances" must outweigh "mitigating circumstances" to support a death sentence. Then it says that mitigating circumstances" must outweigh "aggravating circumstances" to support a life sentence. This leaves the burden of proof unclear. As a result, court processes would become even more complicated.

Proposition 7 does allow the death penalty in more cases than present law. But what cases?

Under Proposition 7, a man or woman could be sentenced to die for lending another person a screwdriver to use in a burglary, if the other person accidentally killed someone during the burglary. Even if the man or woman was not present during the burglary, had no intention that anyone be killed or hurt, in fact urged the burglar not to take a weapon along, they could still be sentenced to die.

This is the kind of law that wastes taxpayers' money by putting counties to the expense of capital trials in many cases where the death penalty is completely inappropriate. To add to the waste, Proposition 7 requires two or more jury trials in some cases where present law requires only one.

Don't let yourself be fooled by claims that Proposition 7 will give California a more effective penalty for murder. It won't. DON'T BE FOOLED BY FALSE ADVERTISING. Vote NO on Proposition 7.

MAXINE SINGER
President, California Probation, Parole and Correctional Association

NATHANIEL S. COLLEY
Board Member, National Association for the Advancement of Colored People

JOHN FAIRMAN BROWN
Board Member, California Church Council

Rebuttal to Argument Against Proposition 7

ALRIGHT, LET'S TALK ABOUT FALSE ADVERTISING.

The opposition maintains if someone were to lend a screwdriver to his neighbor and the neighbor used it to commit a murder, the poor lender could get the death penalty, even though "he had NO INTENTION that anyone be killed."

Please turn back and read Section 6b of the Proposition 7. It says that the person must have INTENTIONALLY aided in the commission of a murder to be subject to the death penalty under this initiative.

They say that Proposition 7 doesn't specify what happens to those who have been charged with murder under the old law. Any first-year law student could have told them Proposition 7 will not be applied retroactively. Anyone arrested under an *old* law will be tried and sentenced under the *old* law.

The opposition can't understand why we included the aggravating vs. mitigating circumstances provision in Proposition 7. Well, that same first-year law student could have told them this provision is required by the U.S. Supreme Court. The old law does not meet this requirement and might be declared unconstitutional, leaving us with no death penalty at all!

If we are to turn back the rising tide of violent crime that threatens each and every one of us, we must act NOW.

This citizen's initiative will give your family the protection of the strongest, most effective death penalty law in the nation.

JOHN V. BRIGGS
Senator, State of California
35th District

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

DUANE LOWE
President, California Sheriffs' Association
Sheriff of Sacramento County

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(g) "Fully Enclosed" means closed in by a ceiling or roof and by walls on all sides.

(h) "Health Facility" has the meaning set forth in Section 1250 of the Health and Safety Code, whether operated by a public or private entity.

(i) "Place of Employment" means any area under the control of a public or private employer which employees normally frequent during the course of employment but to which members of the public are not normally invited, including, but not limited to, work areas, employee lounges, restrooms, meeting rooms, and employee cafeterias. A private residence is not a "place of employment."

(j) "Polling Place" means the entire room, hall, garage, or other facility in which persons cast ballots in an election, but only during such time as election business is being conducted.

(k) "Private Hospital Room" means a room in a health facility containing one bed for patients of such facility.

(l) "Public Place" means any area to which the public is invited or in which the public is permitted or which serves as a place of volunteer service. A private residence is not a "public place." Without limiting the generality of the foregoing, "public place" includes:

(i) arenas, auditoriums, galleries, museums, and theaters;

(ii) business establishments dealing in goods or services to which the public is invited or in which the public is permitted;

(iii) instrumentalities of public transportation while operating within the boundaries of the State of California;

(iv) facilities or offices of physicians, dentists, and other persons licensed to practice any of the healing arts regulated under Division 2 of the Business and Professions Code;

(v) elevators in commercial, governmental, office, and residential buildings;

(vi) public restrooms;

(vii) jury rooms and juror waiting rooms;

(viii) polling places;

(ix) courtesy vehicles.

(m) "Restaurant" has the meaning set forth in Section 28522 of the Health and Safety Code except that the term "restaurant" does not include an employee cafeteria or a tavern or cocktail lounge if such tavern or cocktail lounge is a "bar" pursuant to Section 25939(a).

(n) "Retail Tobacco Store" means a retail store used primarily for the sale of smoking products and smoking accessories and in which the sale of other products is incidental. "Retail tobacco store" does not include a tobacco department of a retail store commonly known as a department store.

(o) "Rock Concert" means a live musical performance commonly known as a rock concert and at which the musicians use sound amplifiers.

(p) "Semi-Private Hospital Room" means a room in a health facility containing two beds for patients of such facility.

(q) "Smoking" means and includes the carrying or holding of a lighted cigarette, cigar, pipe, or any other lighted smoking equipment used for the practice commonly known as smoking, or the intentional inhalation or exhalation of smoke from any such lighted smoking equipment."

SECTION 2: Severability

If any provision of Chapter 10.7 of the Health and Safety Code or the application thereof to any person or circumstance is held invalid, any such invalidity shall not affect other provisions or applications of said Chapter which can be given effect without the invalid provision or application, and to this end, the provisions of said Chapter are severable.

SECTION 3: Effective Date

Chapter 10.7 of the Health and Safety Code becomes effective 90 days after approval by the electorate.

TEXT OF PROPOSITION 6—*Continued from page 29*

truth of the charges upon which a finding of probable cause was based and whether such charges, if found to be true, render the employee unfit for service. This hearing shall be held in private session in accordance with Govt. Code § 54957, unless the employee requests a public hearing. The governing board's decision as to whether the employee is unfit for service shall be made within thirty (30) working days after the conclusion of this hearing. A decision that the employee is unfit for service shall be determined by not less than a simple majority vote of the entire board. The written decision shall include findings of fact and conclusions of law.

(f) Factors to be considered by the board in evaluating the charges of public homosexual activity or public homosexual conduct in question and in determining unfitness for service shall include, but not be limited to: (1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or location of the conduct to the employee's responsibilities; (3) the extenuating or aggravating circumstances which, in the judgment of the board, must be examined in weighing the evidence; and (4) whether the conduct included acts, words or deeds, of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.

(g) If, by a preponderance of the evidence, the employee is found to have engaged in public homosexual activity or public homosexual conduct which renders the employee unfit for service, the employee shall be dismissed from employment. The decision of the governing board shall be subject to judicial review.

SECTION 4. Severability Clause

If any provision of this enactment or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this enactment which can be given effect without the invalid provision of application, and to this end the provisions of this enactment are severable.

TEXT OF PROPOSITION 7—*Continued from page 33*

found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Sec. 5. Section 190.2 of the Penal Code is repealed.

~~190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:~~

~~(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;~~

~~(b) The defendant, with the intent to cause death, physi-~~

~~cally aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;~~

~~(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:~~

~~(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.~~

~~(2) The murder was willful, deliberate, and premeditated, the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.~~

~~(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:~~

~~(i) Robbery in violation of Section 211;~~

~~(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.~~

~~(iii) Rape by force or violence in violation of subdivision (2) of Section 261, or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;~~

~~(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;~~

~~(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.~~

~~(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.~~

~~(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.~~

~~(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.~~

Sec. 6. Section 190.2 is added to the Penal Code, to read:

190.2. (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was

intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Sec. 7. Section 190.3 of the Penal Code is repealed.

~~190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.~~

~~However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.~~

~~However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.~~

~~Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.~~

~~In determining the penalty the trier of fact shall take into account any of the following factors if relevant:~~

~~(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.~~

~~(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.~~

~~(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.~~

~~(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.~~

~~(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.~~

~~(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.~~

~~(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.~~

~~(h) The age of the defendant at the time of the crime.~~

~~(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.~~

~~(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.~~

~~After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.~~

Sec. 8. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved

the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Sec. 9. Section 190.4 of the Penal Code is repealed.

~~190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.~~

~~In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.~~

~~If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.~~

~~If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.~~

~~In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.~~

~~(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.~~

~~If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.~~

~~(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.~~

~~(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact the prior phase is the same trier of fact at the subsequent phase.~~

~~(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.~~

~~The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.~~

~~The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.~~

~~The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial.~~

Sec. 10. Section 190.4 is added to the Penal Code, to read:

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Sec. 11. Section 190.5 of the Penal Code is repealed.

~~190.5. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.~~

~~(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and~~

~~Veterans Code, or Section 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intention ally physically aided or committed such act or acts causing death.~~

~~(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.~~

Sec. 12. Section 190.5 is added to the Penal Code, to read:

190.5. Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

Sec. 13. If any word, phrase, clause, or sentence in any section amended or added by this initiative, or any section or provision of this initiative, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this initiative, or any other section, provisions or application of this initiative, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this initiative are declared to be severable.

Sec. 14. If any word, phrase, clause, or sentence in any section amended or added by this initiative or any section or provision of this initiative, or application thereof to any person or circumstance is held invalid, and a result thereof, a defendant who has been sentenced to death under the provisions of this initiative will instead be sentenced to life imprisonment, such life imprisonment shall be without the possibility of parole.

If any word, phrase, clause, or sentence in any section amended or added by this initiative or any section or provision of this initiative, or application thereof to any person or circumstance is held invalid, and a result thereof, a defendant who has been sentenced to confinement in the state prison for life without the possibility of parole under the provisions of this initiative shall instead be sentenced to a term of 25 years to life in a state prison.

Exhibit D

Senate Bill No. 1437

CHAPTER 1015

An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.

(b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.

(c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.

(d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.

(e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.

(f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.

(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SEC. 2. Section 188 of the Penal Code is amended to read:

188. (a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

SEC. 3. Section 189 of the Penal Code is amended to read:

189. (a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

(1) "Destructive device" has the same meaning as in Section 16460.

(2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.

(3) "Weapon of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

SEC. 4. Section 1170.95 is added to the Penal Code, to read:

1170.95. (a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes

a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.

(d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence.

SEC. 5. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

O

Exhibit E

1990

Voter Information Guide for 1990, Primary

California

BALLOT PAMPHLET

IMPORTANT NOTICE TO VOTERS

You will receive a separate supplemental ballot pamphlet to provide you with information about Propositions 122 and 123, which qualified for the ballot after the printing deadline for this ballot pamphlet. It will be clearly marked "Supplemental Ballot Pamphlet" and. printed in blue ink to help you distinguish the two pamphlets. If you do not receive your supplement by May 30, contact your county elections official or call the toll-free voter hotline at 1-800-345-VOTE.

Primary Election

JUNE 5, 1990

CERTIFICATE OF CORRECTNESS

I, March Fong Eu, Secretary of State of the State of California, do hereby certify that the foregoing measures will be submitted to the electors of the State of California at the PRIMARY ELECTION to be held throughout the State on June 5, 1990, and that this pamphlet has been correctly prepared in accordance with law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 21st day of March 1990.

March Fong Eu

MARCH FONG EU
Secretary of State

115 Criminal Law. Initiative Constitutional Amendment and Statute

Official Title and Summary

CRIMINAL LAW. INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE. Amends state Constitution regarding criminal and juvenile cases: affords accused no greater constitutional rights than federal Constitution affords; prohibits post-indictment preliminary hearings; establishes People's right to due process and speedy, public trials; provides reciprocal discovery; allows hearsay in preliminary hearings. Makes statutory changes, including: expands first degree murder definition; increases penalty for specified murders; expands special circumstance murders subject to capital punishment; increases penalty for minors convicted of first degree murder to life imprisonment without parole; permits probable cause finding based on hearsay; requires court to conduct jury examination. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: The net fiscal effect of this measure is unknown. The measure makes several significant changes to the criminal justice system. How the measure will be implemented and interpreted is unknown. There may be only a minor fiscal impact on state and local governments, or there may be a major fiscal impact.

Analysis by the Legislative Analyst

Background

The California Constitution guarantees citizens certain rights which are not dependent on those guaranteed by the United States Constitution. Some of these rights have been judicially interpreted to be broader than the rights guaranteed under the United States Constitution.

Current state law contains the judicial procedures that must be followed in criminal cases to protect the rights of victims and the accused. These procedures include requirements regarding preliminary court hearings, trials, the use of hearsay as evidence, information disclosure by attorneys, questioning of prospective jurors by attorneys, and the joining of criminal cases.

Under California law, the crime of first-degree murder is defined as one which is deliberate, or takes place during the commission of certain other crimes, or involves torture or the use of poison or certain destructive devices. In general, first-degree murder is punishable by 25 years to life imprisonment with the possibility of parole. If "special circumstances" are found or the commission of a specific crime is involved, adults may be sentenced to life imprisonment without the possibility of parole, or to death. Minors who were 16 or 17 years of age at the time of the crime and who are tried as adults, may not be sentenced to life imprisonment without the possibility of parole or to death.

Proposal

The proposal makes numerous significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases. The more important of these changes are summarized below.

Rights of Defendants in Criminal Cases. The measure provides that the California Constitution shall not be construed by the courts to afford greater rights to criminal defendants, including minors, than those afforded by the Constitution of the United States. These rights include the right to equal protection of the laws, to due process, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment.

First Degree Murder and Special Circumstances. The measure:

- Expands the definition of first-degree murder to include murder committed during the commission or attempted commission of additional serious crimes.
- Expands the list of "special circumstances" to include a variety of serious crimes, such as the killing of a witness to prevent his or her testimony in certain juvenile proceedings.
- Prohibits the dismissal of a special circumstance finding by a judge.
- Allows minors who are 16 or 17 years of age at the time of the crime and convicted of first-degree murder with special circumstances to be punished by life imprisonment *without* the possibility of parole.

Crime of Torture. This measure creates a new crime of torture which would be punished by life imprisonment with the possibility of parole.

Preliminary Hearings. This measure prohibits a preliminary hearing when a felony is prosecuted by grand jury indictment.

Speedy Trial. Generally, this measure:

- Provides the people of California with the right to due process of law and to a speedy and public trial.
- Requires the court to assign felony cases only to defense attorneys who will be ready to proceed within specified time limits.
- Requires felony trials to be set within 60 days of the defendant's arraignment except upon a showing of good cause.

- Establishes a court review procedure for felony cases when preliminary hearings or trials are scheduled beyond the time specified by law or postponed "without good cause." Petitions for a court review would have priority over all other cases in the court.

Disclosure of Information. This measure:

- Changes the rule under which prosecutors and defense attorneys must reveal information to each other in their prospective criminal cases.
- Repeals the requirement that a copy of the arrest report be delivered to the defendant at the initial court appearance, or within two days of the appearance.

Hearsay Evidence. This measure allows the use of hearsay evidence at preliminary hearings if these out-of-court statements are introduced through the testimony of certain trained and experienced law enforcement officers.

Examination of Prospective Jurors. This measure makes major changes in the way juries are selected for criminal trials. Specifically, the measure:

- Repeals a requirement which generally permits reasonable examination of prospective jurors by counsel for the people and for the defendant for purposes of making peremptory challenges and challenges for cause.
- Requires the court to conduct the examination of prospective jurors, but allows further examination by the parties or the court itself upon a showing of good cause.
- Requires that the examination of prospective jurors be conducted only in aid of the exercise of challenges for cause.

Joining Criminal Cases. This measure:

- Prohibits the Constitution from being construed by the courts to prohibit the joining of criminal cases as prescribed by statute.
- Prohibits the severing of jointly charged cases due to the unavailability of or unpreparedness of one or more defendants, except as specified.

Fiscal Effect

The net fiscal effect of this measure is unknown. The measure makes several significant changes to the criminal justice system. How the measure will be implemented and interpreted is unknown. There may be only a minor fiscal impact on state and local governments, or there may be a major fiscal impact.

Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by amending and adding sections thereto, repeals and adds sections to the Code of Civil Procedure, adds a section to the Evidence Code, amends, repeals, and adds sections to the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. (a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.

(b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth.

(c) The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools.

(d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act.

SEC. 2. Section 14.1 is added to Article I of the California Constitution, to read:

SEC. 14.1. If a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing.

SEC. 3. Section 24 of Article I of the California Constitution is amended to read:

SEC. 24. Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

This declaration of rights may not be construed to impair or deny others retained by the people.

SEC. 4. Section 29 is added to Article I of the California Constitution, to read:

SEC. 29. In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial.

SEC. 5. Section 30 is added to Article I of the California Constitution, to read:

SEC. 30. (a) This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature or by the people through the initiative process.

(b) In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process.

(Continued on page 65)

115 Criminal Law. Initiative Constitutional Amendment and Statute

Argument in Favor of Proposition 115

YOUR MOST BASIC RIGHT AS AN AMERICAN IS TO BE SAFE FROM VIOLENCE AND FREE FROM FEAR.

But while politicians keep talking about tougher laws, your chances of becoming a victim keep climbing.

Why?

For years, politicians in Sacramento have refused to enact tougher laws, like those in other states and the federal law, that permit hardened criminals to get a fair but prompt trial without the useless delays that frustrate criminal justice in California.

Why? Because defense lawyers love delays. Witnesses die or their memories fade. Busy people avoid drawn-out jury service. Prolonged trials go haywire. With judges and prosecutors frustrated by delay, plea bargaining runs rampant. And, the longer the trial, the higher the legal fees.

ONE COURT-APPOINTED DEFENSE LAWYER RECENTLY RECEIVED $515,000 IN TAXES YOU PAID. MANY OTHERS ROUTINELY RECEIVE SIX-FIGURE INCOMES.

Proposition 115 does several needed things:

ITS "NIGHTSTALKER" COMPONENT conforms California's criminal law to federal procedures, bringing California back into the mainstream of American criminal justice. This will mean major time savings for the typical California criminal proceeding. It took an incredible four years just to bring the "Nightstalker" to justice! Imagine how much that cost you, the taxpayer, and how much anguish it caused his surviving victims through multiple, drawn-out court appearances.

ITS "SINGLETON" TORTURE PROVISION assures that no criminal will ever again rape a young girl and hack off her arms, and serve only a minimal punishment, such as the 7½ years Singleton served. Instead, Proposition 115 will send such a criminal to prison for life.

ITS "BIRD COURT" DEATH PENALTY PROVISIONS improve our death penalty law and overturn decisions by Rose Bird and her allies which made it nearly inoperative.

PROPOSITION 115 HAS THE OVERWHELMING SUPPORT OF CALIFORNIA'S DISTRICT ATTORNEYS, POLICE CHIEFS, AND SHERIFFS.

It also has the support of thousands of innocent victims of crime who have been the objects of violence, or have lost loved ones, and been dragged through the courts for years by the delaying tactics of highly paid lawyers and an unfeeling legal bureaucracy.

The same people who opposed the "Victims Bill of Rights," the death penalty, and the ouster of Rose Bird from the Supreme Court—a small but vocal cadre of liberal politicians, defense lawyers, and law professors—are trying to discredit this much-needed reform.

They falsely claim it may curb abortion.

DON'T BE FOOLED!

The authoritative non-partisan Counsel to the California State Legislature has ruled Proposition 115 affects only the rights "to privacy" of criminals on trial—not your privacy rights, or the constitutionally guaranteed civil right of a woman to an abortion—and further ruled that any doubt raised by opponents is eliminated by this simple statement we the proponents make that our intent is not to limit in any way a woman's right to choose to have an abortion.

Proposition 115 simply remedies gross inequities and will bring more violent criminals to justice. PLEASE HELP CALIFORNIA LAW ENFORCEMENT AND CRIME VICTIMS BY VOTING YES.

PETE WILSON
U.S. Senator

CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION

COLLENE THOMPSON CAMPBELL
Chair, Memory of Victims Everywhere (M.O.V.E.)

Rebuttal to Argument in Favor of Proposition 115

All of us are angry about escalating violent crime.

Proposition 115 is a political appeal to our anger *by politicians* running for office. In their rush to qualify Proposition 115 for the ballot, they overlooked provisions which compromise our right to an abortion, to free speech and to a fair trial.

Proposition 115 supporters tell us to ignore our doubts. Their horror stories of "Nightstalker" and "Singleton" suggest only the most vicious criminals will be affected.

THE TRUTH IS THE RIGHTS OF ALL CALIFORNIANS ARE JEOPARDIZED.

Proposition 115 eliminates California's Constitutional RIGHT OF PRIVACY which protects a women's right of choice. If *Roe v. Wade* is overturned by the U.S. Supreme Court, the passage of Proposition 115 threatens the right of women to safe and legal abortions.

Senator Wilson's denial is not convincing. He says his "intent" is "authoritative," but to whom? We do not look forward to another judge somewhere deciding what Proposition 115 means and whether we lose our right of choice.

WE HAVE A CONSTITUTIONALLY GUARANTEED RIGHT OF CHOICE TODAY. LET'S KEEP IT.

Proposition 115's "hidden flaws" don't stop with CHOICE. Our rights to religious privacy, doctor-patient confidentiality, and sexual privacy are also threatened.

Prosecutors face difficulties with complicated cases like McMartin or "Night Stalker." Let's solve the problem without causing judicial chaos, socking the taxpayer with millions of dollars of new court expenses and eroding our privacy rights.

PROPOSITION 115 IS FLAWED. WE CAN'T GIVE UP OUR PRIVACY RIGHTS. VOTE NO ON 115.

MICHAEL G. W. LEE
President, San Francisco Bar Association

WILLIAM R. ROBERTSON
Executive Secretary-Treasurer, Los Angeles County Federation of Labor (AFL-CIO)

LINDA M. TANGREN
State Chair, California National Women's Political Caucus

Argument Against Proposition 115

All Californians want accused criminals brought to trial swiftly with minimum inconvenience and discomfort for their victims. But in politics what starts with good intentions often ends with the taxpayer getting something we *don't* want.

PROPOSITION 115 IS TOO BROAD AND COMPLICATED.

In order to speed up trials for those charged with felony crimes in state courts, Proposition 115 asks all Californians to make big sacrifices. Why should we become victims of the Crime Victims Justice Reform Act?

PROPOSITION 115 TAKES AWAY OUR STATE CONSTITUTIONAL RIGHT TO PRIVACY.

- THE RIGHT TO MAKE THE PERSONAL DECISION TO CHOOSE AN ABORTION WILL BE THREATENED. Until now our privacy rights have protected our right to choose abortion free from government intrusion. If Proposition 115 passes and the U.S. Supreme Court overrules *Roe v. Wade*, women and their doctors will be open to prosecution for participating in an abortion.

  Proposition 115 erases California's constitutional privacy right and substitutes the opinions of any five Justices of the U.S. Supreme Court.
- DOCTORS AND PATIENTS WILL HAVE A MORE DIFFICULT TIME KEEPING THEIR MEDICAL RECORDS PRIVATE.
- RELIGIOUS SERVICES WILL NO LONGER HAVE CALIFORNIA'S VIGOROUS PRIVACY PROTECTION, THUS UNDERMINING EVERYONE'S RELIGIOUS FREEDOM.
- WE WILL NO LONGER BE PROTECTED FROM THOSE WHO WOULD VIOLATE OUR SEXUAL PRIVACY. IF PROPOSITION 115 PASSES, CALIFORNIA POLITICIANS WILL BE FREE TO CRIMINALIZE CERTAIN SEXUAL PREFERENCES AS HAPPENS TODAY IN GEORGIA AND OTHER STATES.
- CRIMINAL TRESPASS CHARGES COULD AWAIT THOSE EXERCISING THEIR FREE SPEECH RIGHTS. Our right to pass out leaflets and circulate petitions at shopping malls would no longer be protected by the California Constitution.

Proposition 115 treats us all like criminals in order to get tough with those accused of real crimes.

PROPOSITION 115 COSTS TOO MUCH.

- CALIFORNIA TAXPAYERS WILL HAVE TO PAY MILLIONS OF DOLLARS IN NEW TAXES to reduce trial delays for only 5% of those charged with crimes. 95% plead guilty and don't go to trial. The additional lawyers, judges and court rooms needed to implement Proposition 115 will produce an unfair burden on taxpayers.
- EVEN WITH MORE TAX REVENUES, COURT CONGESTION WILL WORSEN. More trials may result when District Attorneys eliminate preliminary hearings. Preliminary hearings give those charged with crimes their first look at how strong the case is against them. In California, after preliminary hearings 95% plead guilty. WITHOUT PRELIMINARY HEARINGS THE RESULT MAY BE FEWER GUILTY PLEAS, MORE TRIALS, MORE COURT CONGESTION AND SLOWER JUSTICE.

The good intentions of the initiative's backers is not the issue. However well-meaning, they carelessly open a can of worms. It is a complicated business to restructure the judicial system and the sponsors of Proposition 115 create far more serious problems than we have now.

IT DIDN'T HAVE TO BE WRITTEN THIS WAY. PROPOSITION 115 IS NOT A "VICTIMS' RIGHTS INITIATIVE." WE SAY START OVER. IT'S NOT WORTH THE SACRIFICES AND THE COST. VOTE NO ON PROPOSITION 115.

ROBIN SCHNEIDER
Executive Director
California Abortion Rights Action League (CARAL)

SHIRLEY HUFSTEDLER
Former Judge, U.S. Court of Appeals for the 9th Circuit
Former Secretary of Education

W. BENSON HARER, JR., M.D.
Chairman, District 9 (Calif.)
American College of Obstetricians and Gynecologists

Rebuttal to Argument Against Proposition 115

CALIFORNIA WOMEN ARE GUARANTEED REPRODUCTIVE CHOICE AND OTHER "PRIVACY RIGHTS" BY OUR *STATE* CONSTITUTION.

Therefore, even if the *U.S.* Supreme Court overturned Roe vs. Wade, and then our Legislature somehow passed legislation against abortion, neither the legislation nor the Court's decision could restrict a California woman's RIGHT of reproductive choice.

A CALIFORNIA WOMAN'S CONSTITUTIONALLY GUARANTEED RIGHT OF CHOICE *CANNOT BE TAKEN AWAY EXCEPT BY A FUTURE VOTE OF THE PEOPLE EXPRESSLY REPEALING THAT RIGHT.* THAT'S NOT ABOUT TO HAPPEN IN 70% PRO-CHOICE CALIFORNIA.

This initiative doesn't criminalize or permit criminalization of any activity protected by California's constitutional "right to privacy." IT WAS CAREFULLY WRITTEN BY 50 PROSECUTORS TO APPLY ONLY TO *CRIMINAL TRIALS*, NOT TO ABORTION, RELIGION, OR FREE SPEECH. IT'S ENDORSED BY EVERY DISTRICT ATTORNEY IN CALIFORNIA—BOTH DEMOCRATS AND REPUBLICANS.

Opponents cynically raise this false objection to frighten and mislead voters into believing 115 threatens their rights.

BALONEY.

THE REAL OPPONENTS—THOSE FRONTING THE MONEY TO ATTACK 115 WITH FALSE, MISLEADING TELEVISION ADS—ARE THE SAME CRIMINAL DEFENSE AND COURT APPOINTED LAWYERS WHO EARN FAT GOVERNMENT FEES, PLUS A FEW LIBERAL JUDGES AND POLITICIANS WHO SYMPATHIZE MORE WITH CRIMINALS THAN VICTIMS.

Studies show shorter trials under 115 mean reduced lawyer fees and taxpayers cost. Yet opponents claim shorter trials will cost more than the McMartin case.

Opponents promise a "corrected" crime initiative in November. But they deliberately combined their initiative with a huge tax increase they *know* voters *won't* approve.

Don't let them con you. Vote YES.

PETE WILSON
U.S. Senator

WILLIAM G. PLESTED III, M.D.
President, California Medical Association

WOMEN PROSECUTORS OF CALIFORNIA

Proposition 113: Text of Proposed Law

This law proposed by Senate Bill 2751 (Statutes of 1988, Chapter 1094) expressly amends existing sections of the law; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be inserted or added are printed in *italic type* to indicate that they are new.

PROPOSED AMENDMENTS TO INITIATIVE ACT

An act to amend an initiative act entitled "An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation thereof, and repealing all acts and parts of acts inconsistent herewith" approved by the electors November 7, 1922, by amending Sections 12 and 15 thereof, relating to the practice of chiropractic, the amendment to take effect upon the approval thereof by the electors, and providing for the submission thereof to the electors pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

SECTION 1. Section 12 of the act cited in the title is amended to read:

Sec. 12. *Licenses issued under the provisions of this section expire at 12 midnight on the last day of the month of birth of licentiates of the board.*

On or before July 1, 1991, the board shall establish regulations for the administration of a birth month renewal program. Each person practicing chiropractic within this state shall, on or before the ~~first~~ *last* day of ~~January~~ *their month of birth* of each year, after a license is issued to ~~him~~ *them* as herein provided, pay to ~~said~~ *the* Board of Chiropractic Examiners a renewal fee of not more than one hundred fifty dollars ($150) as determined by the board. The secretary shall ; ~~on or before November 1st of each year,~~ mail to all licensed chiropractors in this state, *on or before 60 days prior to the last day of the month of their birth each year,* a notice that the renewal fee will be due on or before the ~~first~~ *last* day of ~~January~~ *the month of their birth* next following. Nothing in this act shall be construed to require the receipts to be recorded in like manner as original licenses. The failure, neglect or refusal of any person holding a license or certificate to practice under this act in the State of California to pay ~~said~~ *the* annual fee during the time ~~his or her~~ *their* license remains in force shall, after a period of 60 days from the ~~first~~ *last* day of ~~January each year, ipso facto,~~ *the month of their birth automatically* work a forfeiture of his or her license or certificate, and it shall not be restored except upon the written application therefor and the payment to the ~~said~~ board of a fee of twice the annual amount of the renewal fee in effect at the time the restoration application is filed except that ~~such~~ *a* licentiate who fails, refuses or neglects to pay ~~such~~ *the* annual tax within a period of 60 days after the ~~first~~ *last* day of ~~January~~ *the month of his or her birth* of each year shall not be required to submit to an examination for the reissuance of ~~such~~ *the* certificate.

SEC. 2. Section 15 of the act cited in the title is amended to read:

Sec. 15. Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title "chiropractor" or "D.C." or any word or title to induce, or tending to induce belief that he *or she* is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word "doctor" or the prefix "Dr." without the word "chiropractor," or "D.C." immediately following his *or her* name, or the use of the letters "M.D." or the words "doctor of medicine," or the term "surgeon," or the term "physician," or the word "osteopath," or the letters "D.O." or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he *or she* held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ~~fifty dollars~~ *one hundred dollars ($100)* and not more than ~~two hundred dollars~~ *seven hundred fifty dollars ($750)* , or by imprisonment in the county jail for not ~~less than thirty days nor~~ more than ~~ninety days~~ *six months* , or by both *fine and imprisonment* .

Proposition 115: Text of Proposed Law

Continued from page 33

In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process.

SECTION 6. Section 223 of the Code of Civil Procedure is repealed.

~~223. In criminal cases:~~

~~(a) It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. Except as provided in Section 223.5, the trial court shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel.~~

~~(b) In each case it shall be the duty of the trial judge to provide for a voir dire process as speedy, focused, and informative as possible, and to protect prospective jurors from undue harassment and embarrassment and from inordinately extensive, repetitive, or unfocused examinations.~~

~~(c) In discharging its duties, the court shall have discretion and control with respect to the form and subject matter and duration of voir dire examination. In exercising that discretion and control, the trial judge shall be guided by, among other criteria, the following:~~

~~(1) The nature of the charges and the potential consequences of a conviction.~~

~~(2) Any unique or complex elements, legal or factual, in the case.~~

~~(3) The individual responses or conduct of jurors which may reveal attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.~~

~~(4) The attorneys' need, under the circumstances, for information on which to exercise peremptory challenges intelligently.~~

~~(d) The trial court shall not permit questions which the trial court concludes would, as their sole purpose, do any of the following:~~

~~(1) Educate the jury panel to the particular facts of the case.~~

~~(2) Compel the jurors to commit themselves to vote in a particular way.~~

~~(3) Prejudice the jury for or against any party.~~

~~(4) Argue the case.~~

~~(5) Indoctrinate the jury.~~

~~Instruct the jury in a matter of law.~~

~~Attempt to accomplish any other improper purpose.~~

~~(e) The trial court shall require that questions be phrased by counsel in a neutral and nonargumentative form.~~

SEC. 7. Section 223 is added to the Code of Civil Procedure, to read:

223. In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.

Examination of prospective jurors shall be conducted only in aid of the exercise of challenges for cause.

The trial court's exercise of its discretion in the manner in which voir dire is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

SEC. 7.5. Section 223.5 of the Code of Civil Procedure is repealed.

~~223.5. (a) As a pilot project applicable solely to criminal cases in the superior courts in Fresno and Santa Cruz Counties during the period July 1, 1988, to June 30, 1991, inclusive, all questions designed solely for assisting in the intelligent exercise of the right to peremptory challenge and not applicable to the determination of implied or actual bias, shall be propounded by the court. If such a question is requested by the prosecution or by counsel for the defense and is one of the standardized questions developed by the Task Force on Voir Dire, the court shall propound the question unless the court determines that the question is clearly inappropriate. If a nonstandardized question is proposed by the prosecution or by counsel for the defense, the court may propound the question in its discretion.~~

~~(b) The Task Force on Voir Dire shall consist of eight members who shall serve without compensation, two of whom shall be appointed by the Judicial Council, two by the Governor, two by the Speaker of the Assembly, and two by the Senate Rules Committee. All appointees shall have been members of the State Bar for at least five years prior to their appointment. The Judicial Council may provide staff to assist the task force.~~

~~All appointments to the Task Force on Voir Dire shall be made on or before March 1, 1988. The task force shall submit to the pilot project counties a list of standardized questions which meet the purposes of subdivision (a) on or before July 1, 1988.~~

~~(c) Notwithstanding the provisions of Section 206, the Judicial Council and any other bona fide research or research organization shall be permitted access to any data regarding the conduct or evaluation of the pilot project. On or before January 1, 1992, the Judicial Council shall report to the Legislature on the effects of the pilot project on the efficiency in jury selection and on any effect on the conviction rate for~~

~~particular crimes compared to a similar prior period in each pilot project county.~~

SEC. 8. Section 1203.1 is added to the Evidence Code, to read:

1203.1. Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in Section 872 of the Penal Code.

SEC. 9. Section 189 of the Penal Code is amended to read:

189. All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, *kidnapping, train wrecking,* or any act punishable under ~~Section 288,~~ *Section 286, 288, 288a, or 289,* is murder of the first degree; and all other kinds of murders are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

SEC. 10. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been ~~charged and specially~~ found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his *or her* act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered and the defendant knew or reasonably should have known that his *or her* act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his *or her* duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his *or her* duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his *or her* official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his *or her* duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his *or her* duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his *or her* official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his *or her* duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his *or her* duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his *or her* testimony in any criminal *or juvenile* proceeding, and the killing was not committed during the commission, or attempted commission ~~or~~ *of* the crime to which he *or she* was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his *or her* testimony in any criminal *or juvenile* proceeding. *As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.*

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was *intentionally* carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record the local, state or federal system in the State of California or in any other state of the United States and the murder was *intentionally* carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the ~~Federal Government~~ *federal government,* a local or ~~State~~ *state* government of California, or of any local or state government of any other state in the United States and the killing was intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. ~~as~~. *As* utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his *or her* race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was in accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211 *or 212.5*.

(ii) Kidnapping in violation of ~~Sections~~ *Section* 207 ~~and~~ *or* 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 288a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation *of subdivision (b) of* Section ~~447~~ *451*.

(ix) Train wrecking in violation of Section 219.

(x) Mayhem in violation of Section 203.

(xi) Rape by instrument in violation of Section 289.

(18) The murder was intentional and involved the infliction of torture. ~~For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.~~

(19) The defendant intentionally killed the victim by the administration of poison.

(b) ~~Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.~~ *Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer as to whom such special circumstance has been found to be true under Section 190.4 need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in state prison for a term of life without the possibility of parole.*

(c) Every person not the actual killer who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in subdivision (a) of this section has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole, in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4.

(e) The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

SEC. 11. Section 190.41 is added to the Penal Code, to read:

190.41. Notwithstanding Section 190.4 or any other provision of law, the corpus delicti of a felony-based special circumstance enumerated in paragraph (17) of subdivision (a) of Section 190.2 need not be proved independently of a defendant's extrajudicial statement.

SEC. 12. Section 190.5 of the Penal Code is amended to read:

190.5. *(a)* Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

(c) The trier of fact shall determine the existence of any special circumstance pursuant to the procedure set forth in Section 190.4.

SEC. 13. Section 206 is added to the Penal Code, to read:

206. Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture.

The crime of torture does not require any proof that the victim suffered pain.

SEC. 14. Section 206.1 is added to Penal Code, to read:

206.1. Torture is punishable by imprisonment in the state prison for a term of life.

SEC. 15. Section 859 of the Penal Code is amended to read:

859. When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. However, in a capital case, the magistrate shall inform the defendant that the defendant must be represented in court by counsel at all stages of the preliminary and trial proceedings and that the representation will be at the defendant's expense if the defendant is able to employ counsel or at public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether the defendant desires to employ counsel of the defendant's choice or to have counsel assigned for him or her, and allow the defendant a reasonable time to send for his or her chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employ counsel, the court shall assign counsel to defend him or her. If it appears that the defendant may be a minor, the magistrate shall ascertain whether that is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor. ~~The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant or counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above-mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible those documents unless otherwise so compelled by the court. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection and copying.~~

SEC. 16. Section 866 of the Penal Code is amended to read:

866. *(a)* When the examination of witnesses on the part of the people is closed, any ~~witnesses~~ *witness* the defendant may produce ~~must~~ *shall* be sworn and examined.

Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

(b) It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery.

(c) This section shall not be construed to compel or authorize the taking of depositions of witnesses.

SEC. 17. Section 871.6 is added to the Penal Code, to read:

871.6. If in a felony case the magistrate sets the preliminary examination beyond the time specified in Section 859b, in violation of Section 859b, or continues the preliminary hearing without good cause and good cause is required by law for such a continuance, the people or the defendant may file a petition for writ of mandate or prohibition in the superior court seeking immediate appellate review of the ruling setting the hearing or granting the continuance. Such a petition shall have precedence over all other cases in the court to which the petition is assigned. If the superior court grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to the court if this action is necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the rights of the parties to seek review in a court of appeal. When the superior court issues the writ and remittitur as provided in this section, the writ shall command the magistrate to proceed with the preliminary hearing without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses.

The court of appeal may stay or recall the issuance of the writ and remittitur. The failure of the court of appeal to stay or recall the issuance of the writ and remittitur shall not deprive the parties of any right they would otherwise have to appellate review or extraordinary relief.

SEC. 18. Section 872 of the Penal Code is amended to read:

872. (a) If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe *that* the defendant *is* guilty ~~thereof~~, the magistrate ~~must~~ *shall* make or indorse on the complaint an order, signed by him *or her*, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe *that* the within named A.B. *is* guilty ~~thereof~~, I order that he or *she* be held to answer to the same."

~~(b) The finding of sufficient cause may be based in whole or in part upon hearsay evidence in the form of written statements of witnesses in lieu of testimony. At the time the defendant appears before the magistrate for arraignment, the prosecuting attorney may file with the court, and furnish a copy to the defendant, a statement made under penalty of perjury of the testimony of any witness which the prosecution wishes to introduce into evidence at the examination in lieu of the testimony of the witness. The statement shall be considered as evidence in the examination. This subdivision shall not apply if the witness is a victim of a crime against his or her person, or the testimony of the witness includes eyewitness identification of a defendant, or the prosecuting attorney has not filed with the court and furnished a copy to the defendant the statement of the testimony of the witness at the time of the arraignment or at least 10 court days prior to the date set for the preliminary hearing. For the purposes of this section an "eyewitness" is any person who sees the perpetrator during the commission of the crime charged, whether or not he or she can identify the perpetrator.~~

~~(c) Nothing in this section shall limit the right of the defendant to call any witness for examination at the preliminary hearing. If the witness called by the defendant is one whose statement of testimony was offered by the prosecuting attorney as provided in subdivision (b), the defendant shall have the right to cross-examine the witness as to all matters asserted in the statement. If the defendant makes reasonable efforts to secure the attendance of the witness but is unsuccessful in securing his or her attendance, the court shall grant a short continuance at the request of the defendant and shall require the prosecuting attorney to present the witness for cross-examination. If the prosecuting attorney fails to present the witness for cross-examination, the statement of the testimony of the witness shall not be considered as evidence in the examination.~~

(b) Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and testifying at preliminary hearings.

SEC. 19. Section 954.1 is added to the Penal Code, to read:

954.1. In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the joinder charged offenses may be tried together before the same trier of fact.

SEC. 20. Section 987.05 is added to the Penal Code, to read:

987.05. In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code for preliminary hearings and trials, except in those unusual cases where the court finds that, due to the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period if he or she were to begin preparing the case forthwith and continue to make diligent and constant efforts to be ready. In the case where the time of preparation for preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation. In making this determination, the court shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business. The court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready. In cases where counsel, after making representations that he or she will be ready for preliminary examination or trial, and without good cause is not ready on the date set, the court may relieve counsel from the case and may impose sanctions upon counsel, including, but not limited to, finding the assigned counsel in contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time.

SEC. 21. Section 1049.5 is added to the Penal Code, to read:

1049.5. In felony cases, the court shall set a date for trial which is within 60 days of the defendant's arraignment in the superior court unless, upon a showing of good cause as prescribed in Section 1050, the court lengthens the time. If the court, after a hearing as prescribed in Section 1050, finds that there is good cause to set the date for trial beyond the 60 days, it shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes.

SEC. 22. Section 1050.1 is added to the Penal Code, to read:

1050.1. In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.

SEC. 23. Chapter 10 (commencing with Section 1054) is added to Title 6 of Part 2 of the Penal Code, to read:

CHAPTER 10. DISCOVERY

1054. This chapter shall be interpreted to give effect to all of the following purposes:

(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.

(b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.

(c) To save court time in trial and avoid the necessity for frequent interruptions and postponements.

(d) To protect victims and witnesses from danger, harassment, and undue delay of the proceedings.

(e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.

1054.1. The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

1054.2. No attorney may disclose or permit to be disclosed to a defendant the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1 unless specifically permitted to do so by the court after a hearing and a showing of good cause.

1054.3. The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.

1054.4. Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section.

1054.5. (a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

(b) Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(c) The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.

1054.6. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

1054.7. The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why disclosure should be denied, restricted, or deferred. If the material information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the

safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

SEC. 24. Section 1102.5 of the Penal Code is repealed.

~~1102.5. (a) Upon motion, the prosecution shall be entitled to obtain from the defendant or his or her counsel, all statements, oral or however preserved, by any defense witness other than the defendant, after that witness has testified on direct examination at trial. At the request of the defendant or his or her counsel, the court shall review the statement in camera and limit discovery to those matters within the scope of the direct testimony of the witness. As used in this section, the statement of a witness includes factual summaries, but does not include the impressions, conclusions, opinions, or legal research or theories of the defendant, his or her counsel, or agent.~~

~~(b) The prosecution shall make available to the defendant, as soon as practicable, all evidence, including the names, addresses and statements of witnesses, which was obtained or prepared as a consequence of obtaining any discovery or information pursuant to this section.~~

~~(c) Nothing in this section shall be construed to deny either to the defendant or to the people information or discovery to which either is now entitled under existing law.~~

SEC. 25. Section 1102.7 of the Penal Code is repealed.

~~1102.7. Notwithstanding any other provision of law, the prosecution shall not be required to furnish to the defendant himself or herself, but only to his or her attorney, the address or telephone number of any victim or witness absent a showing of good cause as determined by the court, unless the defendant is acting as his or her own attorney. When an address or telephone number is released to the defendant's attorney, the court shall order the defendant's attorney not to disclose the information to the defendant.~~

~~If the defendant is acting as his or her own attorney in a case involving force or violence, dangerous or deadly weapons, or witness intimidation and where there is a possibility that the defendant poses a threatening threat to the victim or witness, the court shall protect the address and telephone number of the victim or witness by providing for contact only through a court/appointed licensed private investigator or by imposing other reasonable restrictions. When an address or telephone number is released to a court/appointed licensed private investigator, the court shall order the investigator not to disclose this information to the defendant.~~

SEC. 26. Section 1385.1 is added to the Penal Code, to read:

1385.1. Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive.

SEC. 27. Section 1430 of the Penal Code is repealed.

~~1430. The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the report shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant or his or her counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above/mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible such documents unless otherwise so compelled by law. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection and copying.~~

SEC. 28. Section 1511 is added to the Penal Code, to read:

1511. If in a felony case the superior court sets the trial beyond the period of time specified in Section 1049.5, in violation of Section 1049.5, or continues the hearing of any matter without good cause, and good cause is required by law for such a continuance, either party may file a petition for writ of mandate or prohibition in the court of appeal seeking immediate appellate review of the ruling setting the trial or granting the continuance. Such a petition shall have precedence over all other cases in the court to which the petition is assigned, including, but not limited to, cases that originated in the juvenile court. If the court of appeal grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to that court if such action is necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the right of the parties to file a petition for review in the Supreme Court. When the court of appeal issues the writ and remittitur as provided herein, the writ shall command the superior court to proceed with the criminal case without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses.

The Supreme Court may stay or recall the issuance of the writ and remittitur. The Supreme Court's failure to stay or recall the issuance of the writ and remittitur shall not deprive the respondent or the real party in interest of its right to file a petition for review in the Supreme Court.

SEC. 29. If any provision of this measure or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

SEC. 30. The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Proposition 116: Text of Proposed Law

Continued from page 37

(f) The committee shall consider inclusion of sanitary holding tanks and reasonable passenger amenities including, but not limited to, accommodations for a reasonable number of bicycles carried on board by passengers, for both intercity and commuter applications.

(g) Intercity equipment specifications shall not be adopted unless approved by the National Railroad Passenger Corporation.

99604. If bonds sufficient to fund the total aggregate of the amounts specified in Chapter 3 (commencing with Section 99620) cannot be sold pursuant to Chapter 6 (commencing with Section 99690), the allocation for each project shall be reduced proportionately.

99605. Except as otherwise provided in this part, the Legislature may amend this part, by statute passed in each house of the Legislature by rollcall vote entered in the journal, four-fifths of the membership concurring, if the statute is consistent with, and furthers the purposes of, this part. No changes shall be made in the way in which funds are allocated pursuant to Chapter 3 (commencing with Section 99620), except pursuant to Section 99604.

CHAPTER 2. THE CLEAN AIR AND TRANSPORTATION IMPROVEMENT FUND

99610. The Clean Air and Transportation Improvement Fund is hereby created.

99611. It is the intent of the people of California, in enacting this part, that bond funds shall not be used to displace existing sources of funds for rail and other forms of public transportation, including, but not limited to, funds that have been provided pursuant to Article XIX of the California Constitution, the Transportation Planning and Development Account in the State Transportation Fund, the Mills-Alquist-Deddeh Act (Chapter 4 (commencing with Section 99200) of Part 11), and local transportation sales taxes; that any future comprehensive transportation funding legislation shall not offset or reduce the amounts otherwise made available for transit purposes by this act; and that funding for public transit should be increased from existing sources including fuel taxes and sales tax on fuels.

99612. Notwithstanding Section 13340 of the Government Code, all money deposited in the fund is hereby continuously appropriated to the commission, without regard to fiscal years, for allocation for grants to itself, the department, the Department of Parks and Recreation, and to local agencies pursuant to Chapter 3 (commencing with Section 99620).

99613. (a) The commission shall allocate money from the fund in accordance with the allocations specified in Chapter 3 (commencing with Section 99620) to the department, to the Department of Parks and Recreation, and to local agencies as grants for expenditure for the preservation, acquisition, construction, or improvement of any of the following:

(1) Rights-of-way for rail purposes.

(2) Rail terminals and stations.

(3) Rolling stock, including locomotives, passenger cars, and related rail equipment and facilities.

Exhibit F

California LEGISLATIVE INFORMATION

SB-1437 Accomplice liability for felony murder. (2017-2018)

Date	Result	Location	Ayes	Noes	NVR	Motion
08/30/18	(PASS)	Senate Floor	27	10	3	Unfinished Business SB1437 Skinner et al. Concurrence
		Ayes: Allen, Anderson, Atkins, Beall, Bradford, Cannella, De León, Delgado, Dodd, Galgiani, Glazer, Hernandez, Hertzberg, Hill, Hueso, Jackson, Lara, Leyva, McGuire, Mitchell, Monning, Moorlach, Pan, Skinner, Stern, Wieckowski, Wiener				
		Noes: Bates, Chang, Fuller, Gaines, Morrell, Nguyen, Nielsen, Stone, Vidak, Wilk				
		No Votes Recorded: Berryhill, Portantino, Roth				
08/29/18	(PASS)	Assembly Floor	42	36	2	SB 1437 Skinner Senate Third Reading By MEDINA
		Ayes: Aguiar-Curry, Berman, Bloom, Bonta, Burke, Calderon, Carrillo, Chau, Chiu, Chu, Daly, Eggman, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez Fletcher, Holden, Jones-Sawyer, Kalra, Kamlager-Dove, Levine, Limón, Low, McCarty, Medina, Mullin, Nazarian, O'Donnell, Quirk, Reyes, Rivas, Rubio, Santiago, Mark Stone, Thurmond, Ting, Weber, Wood, Rendon				
		Noes: Acosta, Travis Allen, Arambula, Baker, Bigelow, Brough, Caballero, Cervantes, Chávez, Chen, Choi, Cooley, Cooper, Cunningham, Dahle, Flora, Fong, Frazier, Gallagher, Grayson, Harper, Irwin, Kiley, Lackey, Maienschein, Mathis, Mayes, Melendez, Muratsuchi, Obernolte, Patterson, Quirk-Silva, Salas, Steinorth, Voepel, Waldron				
		No Votes Recorded: Gray, Rodriguez				
08/16/18	(PASS)	Asm Appropriations	12	1	4	Do pass as amended.
		Ayes: Bloom, Bonta, Calderon, Carrillo, Chau, Eggman, Friedman, Eduardo Garcia, Gonzalez Fletcher, Nazarian, Quirk, Reyes				
		Noes: Gallagher				
		No Votes Recorded: Bigelow, Brough, Fong, Obernolte				
06/26/18	(PASS)	Asm Public Safety	5	2	0	Do pass and be re-referred to the Committee on [Appropriations]
		Ayes: Carrillo, Jones-Sawyer, Kamlager-Dove, Quirk, Santiago				
		Noes: Kiley, Lackey				
		No Votes Recorded:				
05/30/18	(PASS)	Senate Floor	26	11	2	Senate 3rd Reading SB1437 Skinner et al.
		Ayes: Allen, Anderson, Atkins, Beall, Cannella, De León, Dodd, Galgiani, Glazer, Hernandez, Hertzberg, Hill, Hueso, Jackson, Lara, Leyva, McGuire, Mitchell, Monning, Moorlach, Pan, Roth, Skinner, Stern, Wieckowski, Wiener				
		Noes: Bates, Berryhill, Fuller, Gaines, Morrell, Newman, Nguyen, Nielsen, Stone, Vidak, Wilk				
		No Votes Recorded: Bradford, Portantino				
05/25/18	(PASS)	Sen Appropriations	5	2	0	Do pass as amended
		Ayes: Beall, Bradford, Hill, Lara, Wiener				
		Noes: Bates, Nielsen				
		No Votes Recorded:				
05/14/18	(PASS)	Sen Appropriations	7	0	0	Placed on suspense file
		Ayes: Bates, Beall, Bradford, Hill, Lara, Nielsen, Wiener				
		Noes:				
		No Votes Recorded:				
04/24/18	(PASS)	Sen Public Safety	6	1	0	

Date	Result	Location	Ayes	Noes	NVR	Motion
						Do pass, but first be re-referred to the Committee on [Appropriations]
		Ayes: Anderson, Bradford, Jackson, Mitchell, Skinner, Wiener				
		Noes: Stone				
		No Votes Recorded:				

Exhibit G

People v. Dejon Vincent Griffin
16NF2053

Ruling on Constitutionality of the enactment of SB1437.

1. Initial enactment of the current version of the comprehensive portion murder statute was by Prop. 7 which was an initiative response to California's reinstatement of capital punishment after *Gregg v. Georgia*.
2. Initiative process a constitutional right of the electorate. (art. IV, sec. 1.)
3. To amend a statute enacted by an initiative is a unique process. (Cal. Const., art. II, sec. 10(c).)
4. "The initiative and referendum are not rights granted the people, but ... powers reserved by them ... and must be zealously guarded by the courts". (*Rossi v. Brown* (1996) 9 Cal.4th 688, 695; *People v. Kelly* (2010) 47 Cal.4th 1008, 1026.). This power is greater than the power of the legislative body. (*Id.* at p. 715.)
5. Amendments that conflict with the subject matter of the initiative process must be accomplished by popular vote. (*Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1486.)
6. "An amendment is a legislative act designed to change some prior or existing law by adding or taking from it some particular provision." (*Quackenbush,* p. 1485.)
7. The defense correctly asks the court to recognize that the legislature remains free to address "related but distinct areas" of an initiative.
8. SB1437 changes definition of malice
9. SB1437 amends the scope of FMR.
10. The Legislature cannot amend or redefine murder in order to avoid the penalties that Proposition 7 set for the crime. (*People v. Weidert* (1985) 39 Cal.3d 836, 844.)
11. Prop. 7 "broadened the class of persons subject to the most severe penalties known to court criminal law." (*Weidert, supra.*)
12. Statutory Intent of the Voters' support this position.,
    a. Proposition 7 changed the minimum term for both 1st and 2nd degree murder.
    b. *In re Oluwa* (1989) 207 Cal.App.3d 439, the Legislature's subsequent enactment of a more generous credit scheme for post-sentence credits was held to be an illegal amendment to Proposition 7.
13. Proposition 7 eliminated the requirement that both principals and accomplices be personally present during the commission of the act or acts causing death. Then existing scope of accomplice liability to defendants who physically aided and abetted the act(s) causing death.
14. Proposition 115 included changes to the FMR by adding additional felonies under Penal Code section 189.
15. Proposition 115 added a language of "major participant" in the special circumstance portion of the death penalty scheme.
    a. An underlying constitutional principal is that for a death penalty statute to be constitutional, the function of the special circumstance to make a first-degree murder eligible for the potential of capital punishment, it must

"narrow' the class of murders. (*People v. Enraca* (2012) 53 Cal.4th 735, 769 ["California Homicide law and the special circumstance listed in section 190.2 adequately narrow the class of murderers eligible for the death penalty. (Citations.) Specifically, the felony-murder special circumstance (190.2, subd. (a)(17)) is not overbroad and adequately narrows the pool of those eligible for death (*People v. Gamache* [(2010)] 48 Cal.4th [347,] 406; *People v. Kraft* (2000) 23 Cal.4th 978, 1078). "In particular, the felony-murder special circumstance is not overbroad despite the number of different possible predicate felonies and the lack of a requirement that the killer have had the intent to kill. (*People v. Marshall* (1990) 50 Cal.3d 907, 946; *Tison v. Arizona* (1987) 481 U.S. 137, 158.)" *Kraft, supra*, at p. 1078. See also *People v. Anderson* (1987) 43 Cal.3d 1104, 1147

b. SB1437 now imposes the same requirement for aider and abettors to qualify for first degree murder.
c. This amendment has the effect of calling into question the ability of the state to seek the death penalty for aiders and abettors under the FMR.

16. And finally, the Legislature was placed on notice of the need to comply with special rules for amending section 188/189 by the Legislative Counsel's letter attached to the People's motion.
17. Thus, for all of the above, under the rule and analysis employed by the California Supreme Court in *Kelly*, the Legislature was not free to enact SB1437 except under the perimeters of art. II, section 10 for amending Proposition 7 or by the supermajority requirement of Proposition. 115. This legislature was enacted by neither procedure and hence is invalid.
18. The situation the court confronted in *County of San Diego v. Commission on State Mandates* is vastly different than SB1437's changes to Proposition 115 and especially Proposition 7, and thus does not change this court's conclusion.
19. The Court declines to give enforcement to this section, SB1437.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO:

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is FRESNO COUNTY DISTRICT ATTORNEY'S OFFICE, 2220 Tulare Street, Suite 1000, Fresno, California 93721.

On March 7, 2019, I served the following document(s) described as:

PEOPLE'S SENTENCING MEMORANDUM AND MOTION TO SET ASIDE PLEA
PEOPLE vs. Neko Wilson
F09904296; 2009H25793

On the interested parties in this action:

Jacque Wilson
San Francisco Public Defender
555 7th St Fl 2
San Francisco, CA 94103-4709
jawilson76@hotmail.com

[x] MAIL

[ ] HAND DELIVERY

[x] EMAIL

X **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

_____ **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **March 7, 2019,** at Fresno, California.

Rosanna Perez,
Senior Legal Assistant